147 U.S. 150

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. ~~422~~ 93

M. B. HOLMES, JOHN DILLARD, AND R. PHIPPS, PLAINTIFFS IN ERROR,

vs.

L. GOLDSMITH AND MAX GOLDSMITH, PARTNERS UNDER THE FIRM NAME OF L. GOLDSMITH & CO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED SEPTEMBER 21, 1889.

the same to be credited by the Auditor in equal quarterly installments upon the receipt of each quarterly return.

Between July 1, 1864, and July 1, 1874, the Postmaster-General was required to ascertain from eight preceding returns the compensation of all postmasters in equal quarterly installments for the eight succeeding returns, and by the act of 1866 he was required to reascertain from the quarterly returns themselves the compensation of all postmasters of the third, fourth, and fifth class to whom was allowed, by the first method, salaries ten per cent. less than the commissions. Thus from the beginning there has been nothing in the nature of discretion or judgment in respect to the compensation of postmasters to be exercised by an officer of the Government, except that conferred upon the Postmaster-General by the provision in the original second section of the act of July 1, 1864, which authorized the Postmaster-General to intervene within a term, and modify the salaries allowed by him in the first instance for the remainder of the term. As there was but two methods provided by law for the ascertainment of the compensation of postmasters, in force between July 1, 1864, and July 1, 1874, one by the ascertainment of such compensation for future limited terms upon the prior returns, the other by an ascertainment of the compensation from, and upon, the returns themselves for such limited terms at the end thereof, no discretion or judgment whatever was conferred upon the Postmaster-General in respect to either of these methods, and as the prayer in this case is that the Postmaster-General shall report the ascertained compensation upon the actual returns for each of three limited terms, it is plain that the thing sought to be done is purely a ministerial act and duty. It would seem that if this is not purely a ministerial act and duty, it is impossible to conceive of any ministerial act and duty.

The distinction may be said to be plain in the cases which have been decided by this court. Where public officers are required to perform duties which require the exercise of judgment as to the weight of evidence considered and as to many other matters, the courts will not intervene by *mandamus* to correct alleged errors of such officers in the performance of such duties requiring such exercise of judgment and discretion. Such, for instance, are the duties performed in considering and deciding pension claims by the Commissioner of Pensions, and in deciding patent claims by the Commissioner of Patents. The distinction between such cases and the ascertainment and crediting compensation of postmasters at fixed rates and by fixed methods prescribed by law, from and upon their returns of postages, by the Postmaster-General and by the Auditor for the Post-Office Department, is marked and complete in every respect. It would seem that if such ministerial duties as these can not be enforced by *mandamus*, that these laws are meaningless and that the Auditor and Postmaster-General are supreme, and that the courts and the legislative power are subordinated to the will of the Auditor or to the will of the Postmaster-General.

HARVEY SPALDING.

147 U.S. 150

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SUPREME COURT OF THE UNITED STATES.

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M. B. HOLMES, JOHN DILLARD, AND R. PHIPPS, PLAINTIFFS IN ERROR,

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

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1 UNITED STATES OF AMERICA, } ss:
District of Oregon, }

To L. Goldsmith and Max Goldsmith, partners under the firm name of L. Goldsmith & Co., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October, A. D. eighteen hundred and eighty-nine, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Oregon, wherein M. B. Holmes, John Dillard, and R. Phipps — plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland, in said district, this 27th July, 1889.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

2 [Endorsed:] No. 1417. U. S. circuit court, district of Oregon. L. Goldsmith & Co. *vs.* M. B. Holmes *et al.* Citation on writ of error. Filed July 29, 1889. R. H. Lamson, clerk, by R. B. Lamson, deputy clerk.

STATE OF OREGON, } ss:
County of Multnomah, }

Due service of the within citation is hereby accepted, at Portland, Oregon, this 29th day of July, 1889, by receiving a copy thereof, duly certified to as such, by P. L. Willis, of counsel for pl'ffs in error.

LEWIS B. COX,
Of Attorneys for Def'ts in Error.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I hereby certify that a true copy of the within citation was lodged in my office for the within-named defendants in error on this 29th day of July, A. D. 1889.

[Seal United States Circuit Court, Oregon.]

R. H. LAMSON,
Clerk of the Within-Named Circuit Court,
By R. B. LAMSON,
Deputy Clerk.

3 In the Supreme Court of the United States.

L. GOLDSMITH and MAX GOLDSMITH, Partners under the Firm Name of L. Goldsmith & Company, *vs.* M. B. HOLMES, JOHN DILLARD, and R. PHIPPS. — No. 1417. Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before the Honorable Matthew P. Deady, one of you, between L. Goldsmith and Max Goldsmith, partners under the firm name of L. Goldsmith & Co., plaintiffs and defendants in error, and M. B. Holmes, John Dillard, and R. Phipps, defendants and plaintiffs in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by complaint doth appear, and we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. eighteen hundred and eighty-nine, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States of America should be done.

Seal United States Circuit Court, Oregon.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this July 26, 1889.

R. H. LAMSON,
Clerk of the Circuit Court of the United States for the District of Oregon,
By D. W. STEVENS,
Deputy Clerk.

[Endorsed:] In the Supreme Court of the United States. L. Goldsmith and Max Goldsmith, partners as M. Goldsmith & Company, *vs.* M. B. Holmes, John Dillard, and R. Phipps. Writ of error. Filed ——, 188–. —— ——, clerk, by —— ——, deputy clerk.

4 In the Supreme Court of the United States.

L. GOLDSMITH and MAX GOLDSMITH, Partners under the Firm Name of L. Goldsmith and Company. *vs.* M. B. HOLMES, JOHN DILLARD, and R. PHIPPS. } No. 1417. Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before the Honorable Matthew P. Deady, one of you, between L. Goldsmith and Max Goldsmith, partners under the firm name of L. Goldsmith & Co., plaintiffs and defendants in error, and M. B. Holmes, John Dillard, and R. Phipps, defendants and plaintiffs in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by complaint doth appear, and we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. eighteen hundred and eighty-nine, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States of America should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this July 26, 1889.

[Seal of U. S. Circuit Court.]

R. H. LAMSON,
Clerk of the Circuit Court of the United States for the District of Oregon,
By D. W. STEVENS,
Deputy Clerk.

[Endorsed:] In the Supreme Court of the United States. L. Goldsmith & Co. *vs.* M. B. Holmes, John Dillard, and R. Phipps. Writ of error. Filed ——, 188-. —— ——, clerk, by —— ——, deputy clerk.

5 In the Circuit Court of the United States for the District of Oregon, October Term, 1887.

Be it remembered that on the 18th day of November 1887, there was filed in the circuit court of the United States for the district of Oregon a complaint in words and figures as follows, to wit:

6 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH and MAX GOLDSMITH, Partners under the Firm Name of L. Goldsmith and Company,
vs.
M. B. HOLMES, JOHN DILLARD, and R. PHIPPS.

Plaintiffs, for cause of action against the above-named defendants, allege—

That at all the times herein mentioned the plaintiffs were and are now citizens of the State of New York, and at all such times the defendants were and now are citizens of the State of Oregon.

That the plaintiffs at all the times herein mentioned were and now are partners under the firm name of L. Goldsmith & Co.

That on or about the 9th day of August, 1886, the defendants made, executed, and delivered to W. F. Owens their certain promissory note, of which the following is a copy, to wit:

$10,000.00. PORTLAND, OREGON, *August* 9, 1886.

Six months after date, without grace, we, or either of us, promise to pay to the order of W. F. Owens ten thousand dollars, for value received, with interest from date at the rate of ten per cent. per annum until paid, principal and interest payable in U. S. gold coin, at the First National bank, in Portland, Oregon, and in case suit is instituted to collect this note or any portion thereof we promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit.

(Signed) M. B. HOLMES.
" JOHN DILLARD.
" R. PHIPPS.

7 That thereafter, on the 9th day of August, 1886, the said W. F. Owens indorsed the said note to these plaintiffs.

That the defendants have not paid the same nor any part thereof.

That $1,000.00 is a reasonable attorney's fee in this action.

Wherefore the plaintiffs ask judgment against the defendants for the sum of ten thousand dollars and interest thereon at the rate of ten per cent. per annum from August 9th, 1886, and one thousand dollars, attorney's fees, and the costs and disbursements of this action.

COX, SMITH AND TEAL,
Attorneys for Plaintiffs.

STATE OF OREGON, *County of Multnomah,* } *ss:*

I, B. Goldsmith, being first duly sworn, say I am the agent of the plaintiffs, and that this action is founded on a written instrument for the payment of money only, and said instrument is in my possession; that the foregoing complaint is true, as I verily believe.

B. GOLDSMITH.

Subscribed and sworn to before me this 18th day of November, 1887.

[SEAL.] SANDERSON REED,
Notary Public for Oregon.

Endorsed: Filed November 18, 1887. R. H. Lamson, clerk.

8 And afterwards, to wit, on the 18th day of December, 1887, there was issued out of said court a summons in words and figures as follows, to wit:

9 DISTRICT OF OREGON, *ss:*

I certify that on the 19 day of November, 1887, at Camas Prairie, Douglas county, in said district, I duly served the within summons upon the therein-named M. B. Holmes by delivering to him personally a true copy of said summons, duly certified to by me as U. S. marshal, together with a copy of the complaint in the within-entitled action, duly certified to by the clerk of the circuit court for said district.

PENUMBRA KELLY,
United States Marshal,
By C. W. FRUSH, *Deputy.*

10 DISTRICT OF OREGON, *ss:*

I certify that on the 19 day of November, 1887, at Dillard's, Douglas county, in said district, I duly served the within summons upon the therein-named John Dillard by delivering to him personally a true copy of said summons, duly certified to by me as U. S. marshal.

PENUMBRA KELLY,
United States Marshal,
By C. W. FRUSH, *Deputy.*

11 DISTRICT OF OREGON, *ss:*

I certify that on the 21 day of November, 1887, at (beyond) Roseburg, Douglas county, in said district, I duly served the within summons upon the therein-named Robert Phipps by delivering to him personally a true copy of said summons, duly certified to by me as U. S. marshal.

PENUMBRA KELLY,
United States Marshal,
By C. W. FRUSH, *Deputy.*

12 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

L. GOLDSMITH and MAX GOLDSMITH, Partners under the Firm Name of L. Goldsmith & Co., *vs.* M. B. HOLMES, JOHN DILLARD, and R. PHIPPS. — No. 1417. Summons.

The President of the United States to M. B. Holmes, John Dillard, and R. Phipps, the above-named defendant-, Greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Portland, in said district, and answer the complaint filed against you in the above-entitled action within ten days from the date of the service of this summons upon you, if served within the county of Multnomah, in said district, or if served within any other county of said district, then within thirty days from the date of such service upon you, and if you fail so to appear and answer for want thereof the plaintiff will take judgment against you for sum of ten thousand dollars and the interest thereon at the rate of ten per cent. per annum from August 9th, 1886, and one thousand dollars, attorney's fees, and the costs and disbursements of this action.

13 And this is to command you, the marshal of said district, or your deputy, to make due service and return of this summons. Hereof fail not.

Seal United States Circuit Court, Oregon.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, affixed at Portland, in said district, this 18th day November, 1887.

R. H. LAMSON, *Clerk*,
[SEAL.] By R. B. LAMSON,
Deputy Clerk.

Endorsed: Filed Dec. 5, 1887. R. H. Lamson, clerk.

14 And afterwards, to wit, on the 18th day of November, 1887, there was duly filed in said court an affidavit for attachment in words and figures as follows, to wit:

15 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH and MAX GOLDSMITH, Partners under the Firm Name of L. Goldsmith and Company, *vs.* M. B. HOLMES, JOHN DILLARD, and R. PHIPPS. — Affidavit for Attachment.

STATE OF OREGON, *County of Multnomah*, } *ss:*

I, B. Goldsmith, being first duly sworn, say that I am the agent

for the plaintiffs and make this affidavit in their behalf; that defendants in the above-entitled action are indebted to the plaintiffs in the sum of $10,000 and interest at 10 per cent. per annum from Aug. 9th, 1886, and $1,000 attorney's fees over and above all legal set-offs or counter-claims upon an express contract for the direct payment of money.

And that such contract is payable in this State, and that the payment of the same has not been secured by any mortgage, lien, or pledge upon real or personal property.

That the sum for which attachment is asked is an actual *bona fide* existing debt due and owing from the defendants to the plaintiffs, and that the said attachment is not sought and said action is not prosecuted to hinder, delay, or defraud any creditors of the defendants.

B. GOLDSMITH.

Subscribed and sworn to before me this 18 day of Nov., A. D. 1887.

[SEAL.] MILTON W. SMITH,
Notary Public for Oregon.

Endorsed: Filed Nov. 18, 1887. R. H. Lamson, clerk.

16 And afterwards, to wit, on the 18th day of November, 1887, there was duly filed in said court an undertaking for attachment in words and figures as follows, to wit:

17 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH and MAX GOLDSMITH, Partners under the Firm Name of L. Goldsmith and Company, Plaintiffs,
vs.
M. B. HOLMES, JOHN DILLARD, and R. PHIPPS, Defendants.
} Undertaking for Attachment.

Whereas the above-named plaintiffs have commenced an action in the above-entitled court against the above-named defendants for the recovery of ten thousand dollars of the United States, besides interest from August 9, 1886, at 10 per cent. per annum and $1,000.00 as attorney's fees and costs and disbursements, and the plaintiffs are about to apply for an attachment against the property of the defendants as security for the satisfaction of such judgment as they may recover against said defendants; and

Whereas the plaintiffs have filed an affidavit for a writ of attachment in said action against the property of the said defendants:

Now, therefore, we, L. Goldsmith and Co., plaintiff-, and J. Lowenberg, surety, hereby undertake to pay all costs that may be adjudged to the defendants and all damages which they may sustain by reason of such attachment if the same be wrongful or without

sufficient cause, not exceeding the sum of twelve thousand five hundred dollars.

Dated the 18 day of Nov., 1887.

L. GOLDSMITH & CO., *Plaintiffs,*
By B. GOLDSMITH, *Att'y-in-Fact.*
J. LOWENBERG, *Surety.*

18 DISTRICT OF OREGON, } ss:
County of Multnomah, }

I, J. Lowenberg, whose name is subscribed to the within undertaking as surety, being first duly sworn, say that I am a resident and householder within the State of Oregon, and am not a counselor or attorney at law, sheriff, clerk, or other officer of any court, and am worth the sum of twenty-five thousand dollars over and above all my debts and liabilities and exclusive of property exempt from execution.

J. LOWENBERG.

Subscribed and sworn to before me this 18 day of Nov., A. D. 1887.

MILTON W. SMITH,
[SEAL.] *Notary Public for Oregon.*

Endorsed: Filed Nov. 18, 1887. R. H. Lamson, clerk.

19 And afterwards, to wit, on the 18th day of November, 1887, there was issued out of said court an attachment writ in words and figures as follows, to wit:

20 In the Circuit Court of the United States for the District of Oregon.

The President of the United States of America to the marshal of the District of Oregon or to his deputy, Greeting:

Whereas L. Goldsmith and Max Goldsmith, partners as L. Goldsmith & Co., hath complained that M. B. Holmes, John Dillard, and R. Phipps are justly indebted to L. Goldsmith and Max Goldsmith, partners as L. Goldsmith & Co., to the amount of ten thousand dollars and interest thereon at the rate of ten per cent. per annum from August 9, 1886, and one thousand dollars as attorney's fees and the costs and disbursements of this action, and the necessary affidavit and undertaking herein having been filed as required by law:

We therefore command you that you attach and safely keep so much of the estate, real or personal, of the said M. B. Holmes, John Dillard, and R. Phipps to be found in your district as shall be of value sufficient to satisfy the said debt and the costs and disbursements of the said plaintiff herein, and of this writ make due service and return.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme

Court of the United States of America, at Portland, in said district, this November 18th, 1887.

[L. S.] R. H. LAMSON, *Clerk*,
By R. B. LAMSON,
Deputy Clerk.

Endorsed: Filed Dec. 9, 1887. R. H. Lamson, clerk.

21 UNITED STATES OF AMERICA, *District of Oregon*, } *ss:*

I, Penumbra Kelly, United States marshal for the district of Oregon, do hereby certify that I received the annexed writ of attachment on the 18th day of November, 1887, and that in execution thereof I did, on the 19th day of November, 1887, at the hour of 9.40 o'clock a. m., within the district of Oregon, levy the same upon the following-described real estate, belonging to the defendant, John Dillard, named in said writ, to wit:

The donation land claim of John Dillard and wife, certificate number 838, notification No. 3197, and partly described as being the north half of section 28 and the east half of section 29, in township 28 south, of range 6 west, of the Willamette meridian, in Douglas county, Oregon, containing 640 acres, more or less; also begin-ing at the southeast corner of section 20, in township 28 south, range 6 west, running thence west 23 chains; thence north 4.35 chains; thence east 23 chains; thence south 4.35 chains to place of begin-ing, containing 10 acres; also lots 1 and 2, in section 29, township twenty-eight south, of range 6 west, of the Willamette meridian, containing 14.47 acres; also the southwest quarter of the southwest quarter of section 32, township 28 south, range 6 west, of the Willamette meridian, containing 40 acres, in Douglas county, Oregon, by delivering to John Dillard in person a copy of said writ, certified to by me as U. S. marshal, he being the occupant of said property; and, in fu-ther execution of said writ, I did, on said 19th day of November, at the hour of three o'clock p. m., within the district of Oregon, levy the same upon the following-described real estate, being the property of the defendant named in said writ, M. B. Holmes, to wit, the north half of the southwest quarter and the southeast quarter of the northwest quarter of section 25, containing 120 acres, and the north half of the northwest quarter of section 25, containing 80 acres, and the southwest quarter of the northwest quarter of section 25, containing 40 acres, all in township 29 south, of range 9 west; also the donation land claim of Adam Day, claim 44, notification No. —, being part of section 26, in township 29 south, of range 9 west, and beginning at the southeast corner of section 26, township 29 south, of range 9 west; thence north 56.50 chains; thence west 56.50 chains; thence south 56.50 chains; thence east 56.36 chains to the
22 place of begin-ing, containing 18.83 acres; also the fractional northeast quarter and the fractional east half of northwest quarter of fractional northeast quarter of southwest quarter of section 26, township 29, south of range 9 west, containing 158.80

acres; also the south half of the southwest quarter of section 25, in township 29, south of range 9 west, containing 80 acres; also the northeast quarter of the northwest quarter of section 35, in township 29, south of range 9 west, containing 40 acres; also lots 1, 2, and 3 and the northwest quarter of the southeast quarter and 5.50 acres in the north part of the southwest quarter of the southeast quarter and lot 4 and the undivided two-sixths interest in and to the west half of the northeast quarter, all being in section 25, in township 29, south of range 9 west; also the west half of the southwest quarter, the southeast quarter of the southwest quarter of section 8, and lots 1 and 2 of section 17, in township 29 south, of range 8 west, containing 152.96 acres; also three-sixths of the west half of the northeast quarter of section 25, in township 29 south, of range 9 west, containing 40 acres, all in Douglas county, Oregon, by delivering to said Holmes in person a copy of said writ, certified to by me as U. S. marshal, he, said Holmes, being the occupant of said property.

And, in further execution of said writ, I did, on the 21st day of November, 1887, at the hour of nine o'clock a. m., within the district of Oregon, levy the same upon the following-described real estate, belonging to the defendant named in said writ, Robert Phipps, to wit, the southeast quarter of the northeast quarter of section 4 and the fractional south half of the northwest quarter of section 3, in township 29 south, of range 6 west, containing 97.50 acres; the west half of the northwest quarter of section 11 and the east half of the northeast quarter of section 10, in township 29 south, of range 6 west; also D. C. 41, in township 28 south, of range 6 west, begin-ing at a point 12 chains north and 9.25 chains east from the southwest corner of section 33, running thence north 40 chains; thence east 40 chains; thence south 40 chains, and thence north 89 degrees and 34 minutes west 39.56 chains to place of be-
23 gin-ing; the southwest quarter of the southeast quarter, the southeast quarter of the northwest quarter, and the east half of the southwest quarter of section 11, in township 29 south, of range 5 west, containing 160 acres; also a piece begin-ing at the northwest corner of the southwest quarter of the northwest quarter of section 14, in township 29 south, of range 5 west, running thence south 15 chains; thence east 13.33 chains; thence north 15 chains; thence west 13.33 chains to the place of begin-ing, containing 20 acres; also a tract begin-ing at a point 20 chains south of one-quarter post on north bound-ry of section 14, in township 29 south, of range 5 west, running thence south 15 chains; thence west 26.78 chains; thence north 15 chains; thence east 26.78 chains to place of begin-ing, containing 40 acres; also the northeast quarter of the northwest quarter of section 14, in township 29 south, of range 5 west; the southwest quarter of the southwest quarter of section 11 and the northwest quarter of the northwest quarter of section 14, in township 29 south, of range 5 west; also the donation claim of R. Phipps, No. 37, in township 29 south, of range 6 west; also donation claim No. 42, in township 28 south, of range 6 west, containing 163 acres; also the donation claim of R. M. McKee, in townships 28 and

29 south, of range 6 west, containing 147.22 acres; also the southeast quarter of section 28, the fractional northeast quarter of section 33, the northwest quarter of fractional southwest quarter, the north half of the southeast quarter, the northwest quarter of the northeast quarter of section 34, the west half of the east half and the northeast quarter of the northeast quarter of section 27, in township 28 south, of range 6 west; also the south half of the southeast quarter of section 34, in township 28 south, of range 6 west; also
24 the north half of the southeast quarter and lot 1 of section 3, in township 29 south, of range 6 west, containing 160.88 acres; also the southwest quarter of section 27, in township 28 south, of range 6 west, *also the following* by delivering to Mary Phipp, wife of said Robert Phipp, in person a copy of said writ, certified to by me as United States marshal, she being the occupant of said property.

And, in further execution of said writ, I did, on said 21st day of November, at the hour of twelve o'clock noon, within the district of Oregon, levy the same upon the following-described real estate of the def't named in said writ, Robert Phipps, to wit, all of the northwest quarter of section twenty-seven, in township 28 south, of range 6 west, that lies south of the South Umpqua river, by delivering to one Wiley Isaacs in person a copy of said writ, certified to by me as U. S. marshal, he being the occupant of said property.

And, in further execution of said writ, I did, on the last-mentioned day and hour, levy the same upon the following-described real estate, belonging to the defendant named in said writ, Robert Phipp, to wit, all that piece of land described as follows, the fractional northeast quarter of the southwest quarter of section 14, in township 28 south, of range 6 west; also donation claim No. 44, being parts of section- 13 and 14, in township 28 south, of range 6 west, of Stephen Marsh and wife; also one undivided one-seventh interest in the south half of donation claim W. R. Foster, being donation claim No. 45, in township 28 south, of range 6 west; also the north half of the northwest quarter of section 14 and lots 2 and 3 in said section 14, the northeast quarter of the northeast quarter of section twenty-three, and the west half of the northeast quarter of the southwest quarter of section 24, all in township 28 south, of range 6 west; also the south half of donation claim No. 45 of W. R. Foster, in township 28 south, of range 6 west; the south half of the northwest quarter and lots 2 and 3 in section 14, the northeast quarter of the northeast quarter of section 23, and the west half of the northeast quarter of the southwest quarter of section 24, in township 28 south, of range 6 west; the northeast quarter of the northwest quarter of section 14, the west half of the northeast
25 quarter of the northwest quarter of section 24, in township 28 south, of range 6 west, by posting in a conspicuous place on said land, on the outside of an unoccupied house standing thereon, a copy of said writ, certified to be me as United States marshal, there being no occupant of the said land, all of said lands being situate in Douglas county, State of Oregon; and within ten days thereafter, to wit, on or about the 24th day of November, 1887,

I duly filed with the county clerk of Douglas county a certificate of each levy of attachment hereinbefore mentioned and recited.

Dated this 8th day of December, 1887.

PENUMBRA KELLY,
U. S. Marshal,
By CHARLES W. FRUSH, *Deputy.*

Endorsed: Filed December 9, 1887. R. H. Lamson, clerk.

26 And afterwards, to wit, on the 20th day of December, 1887, there was duly filed in said court a demurrer to complaint in words and figures as follows, to wit:

27 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH and MAX GOLDSMITH, Partners under the Firm Name of L. Goldsmith and Company, Plaintiffs,
vs.
M. B. HOLMES, JOHN DILLARD, and R. PHIPPS, Defendants.

Now come the defendants and demur to the complaint filed herein because the same does not state facts sufficient to constitute a cause of action.

P. L. WILLIS,
Attorneys for Defendants.

STATE OF OREGON,
County of Multnomah, } ss:

Due service of the within demurrer is hereby accepted at Portland, Oregon, this 20th day of December, 1887, by receiving a copy thereof duly certified to as such by P. L. Willis, counsel for defendants.

COX, SMITH AND TEAL,
Attorneys for Plaintiffs.

Endorsed: Filed Dec. 20, 1887. R. H. Lamson, clerk.

28 And afterwards, to wit, on Friday, the 5th day of October, 1888, the same being the 4th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

29 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH *et al.*
vs.
M. B. HOLMES *et al.* } No. 1417.

OCTOBER 5, 1888.

Now, at this day, come the plaintiffs, by Mr. L. B. Cox, of counsel, and confesses the demurrer filed to the complaint herein, and, on

motion of said plaintiffs, it is ordered that they may have leave to file an amended complaint herein.

30 And afterwards, to wit, on the 5th day of October, 1888, there was duly filed in said court an amended complaint, in words and figures as follows, to wit:

31 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH and MAX GOLDSMITH, Partners under the Firm Name of L. Goldsmith & Co., Plaintiffs,
vs.
M. B. HOLMES, JOHN DILLARD, and R. PHIPPS, Defendants.

The above-named plaintiffs, L. Goldsmith and Max Goldsmith, citizens of the State of New York, complain of the above-named defendants, M. B. Holmes, John Dillard, and R. Phipps, citizens of the State of Oregon, and, by way of amended complaint, allege—

That at all the times hereinafter mentioned the plaintiffs were and they now are citizens of the State of New York, and that at all such times the defendants were and they now are citizens of the State of Oregon.

That at all the times hereinafter mentioned the plaintiffs were and they now are partners doing business in the city of New York under the firm name of L. Goldsmith & Co.

That on or about the first day of August, 1886, one W. F. Owens applied to the plaintiffs for a loan of ten thousand dollars ($10,000.00), offering to give therefore a promissory note with such additional parties thereto as should be approved by the plaintiffs; to which application, upon the condition stated, the plaintiffs acceded.

That thereupon, on the 9th day of August, 1886, said Owens procured the defendants to execute and deliver to him their certain promissory note in writing, in words and figures as follows, to wit:

$10,000.00. PORTLAND, OREGON, *August 9th*, 1886.

Six months after date, without grace, we or either of us promise to pay to the order of W. F. Owens ten thousand dollars for
32 value received, with interest from date at the rate of ten per cent. per annum until paid, principal and interest payable in U. S. gold coin, at the First National bank, in Portland, Oregon; and in case suit is instituted to collect this note or any portion thereof, we promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit.

No. 40190.
Due Feb. 9, '87.

M. B. HOLMES.
JOHN DILLARD.
R. PHIPPS.

That thereupon, on said 9th day of August, said Owens indorsed said note by writing his name in blank upon the back thereof and

at the same time subscribed his name to the following indorsement, written upon the back of said note, to wit: "For value received I hereby waive on the within demand notice and protest," and delivered said note to the plaintiffs as security for the repayment of said proposed loan; whereupon said plaintiffs approved and accepted said note and advanced to said Owens the said sum of ten thousand dollars ($10,000.00).

That said defendants executed said note for the accommodation of said Owens to enable him to procure said loan thereon and not otherwise, and that said Owens was, in fact, a maker of said note to the plaintiffs and never had any cause of action thereon against the defendants.

That said note is wholly unpaid.

That one thousand dollars ($1,000.00) is a reasonable attorney's fee in this action.

Wherefore said plaintiffs demand judgment against said defendants for the sum of ten thousand dollars ($10,000.00), with in-
33 terest thereon, at the rate of ten per cent. per annum, from the 9th day of August, 1886, and for one thousand dollars ($1,000.00), attorney's fee, and for costs and disbursements of this action.

COX, SMITH AND TEAL,
Plaintiffs' Attorneys.

STATE OF OREGON, *Multnomah County,* } ss:

I, B. Goldsmith, being first duly sworn, say I am the agent of the plaintiffs in the above-entitled action; that neither of the plaintiffs is within the State of Oregon; that I know the contents of the foregoing complaint and believe the same to be true.

B. GOLDSMITH.

Subscribed and sworn to before me this 4th day of October, 1888.

SANDERSON REED,
[L. S.] *Notary Public for Oregon.*

Service by copy admitted, at Portland, Oregon, October 4th, 1888.

P. L. WILLIS,
Att'y for Defendants.

Endorsed: Filed Oct. 5, 1888. R. H. Lamson, clerk.

34 And afterwards, to wit, on the 13th day of October, 1888, there was duly filed in said court a demurrer to amended complaint in words and figures as follows, to wit:

35 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH and MAX GOLDSMITH, Partners under the Firm Name of L. Goldsmith & Co., Plaintiffs,
vs.
M. B. HOLMES, JOHN DILLARD, and R. PHIPPS, Defendants.

Now come the defendants above named and demur to the amended complaint filed herein because:

1st. This court has no jurisdiction of the subject of this action.

2nd. This court has no jurisdiction of the person of either of these defendants.

3rd. The amended complaint does not state facts sufficient to constitute a cause of action.

P. L. WILLIS,
Attorney for Defendants.

I, P. L. Willis, do hereby certify that I am attorney for the defendants in the above-entitled action, and that the foregoing demurrer is, in my opinion, well founded in law.

P. L. WILLIS,
Attorney for Defendants.

STATE OF OREGON, *County of Multnomah,* } *ss:*

Due service of the within demurrer is hereby accepted at Portland, Oregon, this 13th day of Oct., 1888, by receiving a copy thereof, duly certified to as such by P. L. Willis, counsel for def'ts.

COX, SMITH AND TEAL,
Attorneys for Pl'ffs.

Endorsed: Filed 13 Oct., 1888. R. H. Lamson, clerk.

36 And afterwards, to wit, on Friday, the 19th day of October, 1888, the same being the 11th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

37 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH *et al.*
vs.
M. B. HOLMES *et al.* } No. 1417.

OCTOBER 19, 1888.

Now, at this day, on motion of Mr. L. B. Cox, of counsel for the plaintiffs, it is ordered that this cause be, and the same is hereby, set for hearing on the demurrer to the amended complaint on Wednesday, October 24, 1888.

38 And afterwards, to wit, on Monday, the 5th day of November, 1888, the same being the 18th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

39 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH *et al.*
vs.
M. B. HOLMES *et al.* } No. 1417.

NOVEMBER 5, 1888.

This cause was heard upon the demurrer to the amended complaint and was argued by Mr. L. B. Cox, of counsel for the plaintiffs, and by Mr. P. L. Willis, of counsel for the defendants; on consideration whereof, it is ordered that said demurrer be, and the same is hereby, overruled.

40 And afterwards, to wit, on the 5th day of November, 1888, there was duly filed in said court an opinion on demurrer in words and figures as follows, to wit:

41 United States Circuit Court, District of Oregon.

MONDAY, *November* 5, 1888.

L. GOLDSMITH, MAX GOLDSMITH
v.
M. B. HOLMES, JOHN DILLARD, R. PHIPPS. } No. 1417.

Action to recover money.

(1.) Relation of parties to negotiable instruments.—The true relation of parties to a negotiable instrument may, as between themselves, be proven by parol whenever it is necessary to a correct determination of the right or liability of either of them thereon, and this may be done to enable a party to such an instrument to maintain an action thereon in the U. S. circuit court.

(2.) Case in judgment.—W. F. Owens, wishing to borrow $10,000 of the plaintiffs, offered to give a note therefor, with the defendants as security, and, the plaintiffs consenting, he delivered them a note for the amount, signed by the defendants and payable to his order, which he at the same time endorsed, and also subscribed a waiver of notice and protest written thereon, and received the amount to his own use. The note not being paid when due, the plaintiffs brought this action against the defendants to recover the amount thereof. The defendants demur to the complaint for want of jurisdiction in the court: Held that the plaintiffs are the payees and not the assignees of the note, and that there never was any as-

signment thereof within the restriction on the jurisdiction of this court over an action to recover the contents of a promissory note contained in the last clause of § 1 of the judiciary act of 1887, 23 Stat., 553.

DEADY, *J.*:

This action is brought by the plaintiffs, citizens of New York, against the defendants, citizens of Oregon, to recover the contents of a promissory note made by the latter for $10,000.

It is alleged in the complaint that on or about August 1, 1886, W. F. Owens applied to the plaintiffs for a loan of $10,000, and offered to give therefor a promissory note, with such additional parties thereto as should be approved by the plaintiffs, to which application, on the condition stated, the plaintiffs acceded; that thereupon, on August 9, 1886, Owens procured the defendants to "execute" and deliver to him a promissory note for that sum, payable with interest in six months to his order and signed by them as makers; that thereafter Owens endorsed said note by writing his name in blank thereon, and at the same time subscribed his name to the following indorsement thereon: "For value received, I hereby waive on the within demand notice and protest," and delivered the same to the plaintiffs as security for the payment of the proposed loan, whereupon the plaintiffs accepted said note and advanced thereon to Owens the sum of $10,000; that the defendants "executed" said note for the accommodation of Owens, to enable him to procure said loan thereon and not otherwise, and the latter was, in fact, the maker of said note to the plaintiffs, and never had any cause of action thereon against the defendants, and that said note is wholly unpaid.

The defendants demur to the complaint for that (1) the court has no jurisdiction of the subject of the action nor the persons of the defendants therein, and (2) the facts stated do not constitute a cause of action.

On the argument of the demurrer counsel for the defendants relied solely on the point that under section 1 of the act of 1887 (24 Stat., 553) this court has no jurisdiction of this action to recover the contents of the note in question, because an action could not have been maintained herein for such purpose "if no assignment or transfer" thereof had been made to them.

It is admitted that Owens is dead and that in his lifetime he was a citizen of Oregon, and that, the complaint being silent as to his citizenship, he must, for the purposes of this demurrer, be presumed to have been a citizen of Oregon at the time of the delivery of the note to the plaintiffs. See Morgan *vs.* Gay, 19 Wall., 81.

On the facts stated in the complaint counsel for the plaintiffs contend that the case is not within the purview of the statute; that Owens was not the assignor of this note, but a joint maker with the defendants; that the plaintiffs are, in point of fact, the payees of the note and the first holders of the same for value, and that it was first put in circulation when delivered to them, and has never been assigned to any one.

The plain purpose of the statute is to prevent the holder of a promissory note or other chose in action, who, by reason of the citizenship of the parties thereto, cannot sue those liable to him thereon in the United States circuit court, from assigning or transferring the same to some one who can do so.

The note had no existence as a legal obligation until it was delivered to the plaintiffs. Prior to that it was but an inchoate instrument, which could only become binding by passing into the hands of a *bona fide* holder for value. Brummel *vs.* Enders, 18 Gratt., 894.

It was made by the defendants for the accommodation of Owens, and until he wrote his name on it and delivered it to the plaintiffs no one was liable on it or could maintain an action thereon. It was in fact Owens' own note, with these defendants as his co-makers and sureties, on which he borrowed the money of the plaintiffs and of which he was to all intents and purposes the maker.

Although an indorser in form, the law regards him as a maker, and therefore the holder of the instrument was not bound to give Owens notice of the non-payment thereof by the defendants, even if he had not expressly waived the same. 2 Dan. Neg. Inst., § 1085.

The true relations between the parties to a negotiable instrument are not conclusively shown by its form, and therefore it may be proved by parol that they are otherwise. Brummel *v.* Enders, 18 Gratt., 905; Harris *v.* Brooks, 21 Pick., 195; Smith *v.* Morrill, 58 Maine, 48; Susquehanna B. & B. Co. *v.* Evans, 4 Wash. C. C., 480; Hubbard *v.* Gurney, 64 N. Y., 457; Sweet *v.* McAllister, 4 Allen, 353; 1 Dan. Neg. Inst., § 723; 2 Whar. Ev., § 1059.

For instance, it is said in the last case cited that it may be shown "that the payee or indorsee was the real principal, or that all the parties were joint principals or some of them joint sureties," citing Clapp *v.* Rice, 13 Gray, 403.

So, in this case, if Owens had paid this note when it became due and then brought an action as payee thereof to recover the amount from the defendants as makers of the same, they might have shown by parol the true relation between themselves and Owens; that he was in fact the principal in and maker of the note and received the money thereon, and that they were only his sureties, and thus defeat the action.

Is there any good reason why the plaintiff may not, for the purpose of maintaining this action in this court, show that notwithstanding the form of the note they are in fact the payees of the same; that it has never been really assigned to any one, but was put in circulation by delivery to them by Owens, one of the makers thereof, for money then loaned to him? I can conceive of none, nor has any been suggested in the argument.

The jurisdiction of this court is presumably a beneficial one, and therefore the law conferring it is not to be strictly construed, but rather the exception to it. The exercise of this jurisdiction tends to promote confidence and commercial intercourse between the citizens of the several States of the Union, by furnishing them a com-

paratively impartial tribunal wherein to adjudicate and enforce the controverted and unsatisfied claims growing out of such intercourse.

The facts showing the true relations between the parties to this note may, as between themselves, be alleged and proven by parol, for any purpose affecting either of their rights or liabilities thereon. The right of the plaintiffs "to recover the contents" of this note from the defendants by an action in this court and the liability of the defendants therein are among these rights and liabilities. Therefore when it is necessary, to maintain the jurisdiction of the court in such an action, to show that the plaintiff, who, upon the face of a note, is in form an endorsee or assignee thereof, is in fact the payee of the same, it may be done.

On the facts stated in the complaint the plaintiffs are the payees and first holders of this note. There never was any assignment of it, and the case does not come within the restriction of the judiciary act nor the reason of it.

The demurrer is overruled.

Mr. Lewis B. Cox for the plaintiffs.

Mr. Parish L. Willis for the defendants.

(S'g'd) MATTHEW P. DEADY,
U. S. District Judge, Oregon.

Endorsed: Filed November 5, 1889. R. H. Lamson, clerk.

42 And afterwards, to wit, on Wednesday, the 7th day of November, 1888, the same being the 19th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

43 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH *et al.*
vs.
M. B. HOLMES *et al.* } No. 1417.

NOVEMBER 7, 1888.

Now, at this day, come the plaintiffs, by Mr. Milton W. Smith, of counsel, and the defendants, by Mr. P. L. Willis, of counsel, and, on motion of said defendants, it is ordered that said defendants be, and they are hereby, allowed twenty days from this date in which to file their answer herein.

44 And afterwards, to wit, on the 27th day of November, 1888, there was duly filed in said court an answer in words and figures as follows, to wit:

45 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH and MAX GOLDSMITH, Partners under the Firm Name of L. Goldsmith & Co., Plaintiffs,
vs.
M. B. HOLMES, JOHN DILLARD, and R. PHIPPS, Defendants.

The above-named defendants, M. B. Holmes, John Dillard, and R. Phipps, for answer to the amended complaint of plaintiffs filed herein say:

As to whether on or about the first day of August, 1886, or at any other time, one W. F. Owens applied to the plaintiffs for a loan of $10,000.00, or offered to give therefore a promissory note, with such additional parties thereto as should be approved by the plaintiffs, or any promissory note, or to which or to any application plaintiffs acceded, these defendants and each of them deny any knowledge or information thereof sufficient to form a belief.

And deny that on the 9th day of August, 1886, or at any other time, said Owens procured the defendants or any or either of them to, or that the defendants or any or either of them did, on the 9th day of August, 1886, or at any other time, either execute or deliver to said Owens or to any other person or persons the promissory note in the complaint described.

And whether or not on the 9th day of August, 1886, or at any other time, said Owens indorsed any note by writing his name in blank upon the back thereof or otherwise, or at the same or any other time subscribed his name to the indorsement in said complaint alleged written upon the back of the alleged or any note, or delivered any note to the plaintiff- as security for the repayment of the proposed loan in complaint alleged or any loan, or for any other purpose, or plaintiffs approved or accepted any note or
46 advanced to said Owens the sum of $10,000.00 or any other sum, these defendants and each of them deny any knowledge or information thereof sufficient to form a belief.

And deny that these defendants or any or either of them executed the note in the complaint set forth, for the accommodation of said Owens or to enable him to procure the loan in said complaint alleged or any loan thereon, or for any other purpose or at all, and deny that said Owens was in fact a maker of said alleged note.

And deny that one thousand dollars or any other sum is a reasonable attorney's fee in this action.

Wherefore these defendants demand judgment against the plaintiffs for costs and disbursements of this action.

W. R. WILLIS AND P. L. WILLIS,
Att'ys for Def'ts.

STATE OF OREGON, }
County of Douglas, } *ss:*

I, R. Phipps, being first duly sworn, say I am one of the defendants above named, and the foregoing answer is true as I verily believe.

R. PHIPPS.

Subscribed and sworn to before me this 19th day of Noverber, A. D. 1888.

[SEAL.] G. A. TAYLOR, *Co. Clerk,*
By F. W. BENSON, *Deputy.*

STATE OF OREGON, }
County of Multnomah, } *ss:*

Due service of the within answer is hereby accepted at Portland, Oregon, this 27th day of November, 1888, by receiving a copy thereof, duly certified to as such by P. L. Willis, of counsel for def'ts.

COX, SMITH AND TEAL,
Attorneys for Plaintiffs.

Endorsed: Filed Nov. 27, 1888. R. H. Lamson, clerk.

47 And afterwards, to wit, on Wednesday, the 28th day of November, 1888, the same being the 28th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

48 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH *et al.* }
vs. } No. 1417.
M. B. HOLMES *et al.* }

NOVEMBER 28, 1888.

Now, at this day, on motion of Mr. Lewis B. Cox, of counsel for the plaintiffs, it is ordered that this cause be, and the same is hereby, set for trial on Wednesday, January 2, 1889.

49 And afterwards, to wit, on Wednesday, the 5th day of December, 1888, the same being the 32d judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

50 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH *et al.* }
vs. } No. 1417.
M. B. HOLMES *et al.* }

DECEMBER 5, 1888.

Now, at this day, on motion of Mr. Lewis B. Cox, of counsel for plaintiffs, it is ordered that this cause be, and the same is hereby, set for trial on Friday, December 28, 1888.

51 And afterwards, to wit, on Friday, the 14 day of December, 1888, the same being the 39th judicial day of the regular Oc-

tober term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

52 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH *et al.*
vs.
M. B. HOLMES *et al.* } No. 1417.

DECEMBER 14, 1888.

Now, at this day, on motion of Mr. Joseph N. Teal, of counsel for the plaintiffs, it is ordered that the trial of this cause be, and the same is hereby, continued until Wednesday, January 9, 1889.

53 And afterwards, to wit, on Monday, the 14th day of January, 1889, the same being the 59th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

54 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH *et al.*
vs.
M. B. HOLMES *et al.* } No. 1417.

JANUARY 14, 1889.

Now, at this day, come the plaintiffs, by Mr. Lewis B. Cox and Mr. Rufus Mallory, of counsel, and the defendants, by Mr. P. L. Willis and Mr. William R. Willis, of counsel, and, this being the day set for the trial of this cause, now come the following-named jurors to try the issue joined, viz., Joseph Smith, H. S. Marsh, M. Manning, S. A. Neppach, John Blevins, S. H. Kennedy, James B. O'Shea, Gustave Kramine, William Knotts, H. C. McTimmons, E. G. Cox, and R. S. Cathey, twelve good and lawful men of the district, who, being duly empannelled and sworn, proceed to hear the evidence adduced, and, the hour of adjournment having arrived, the trial of this cause is continued until to-morrow.

55 And afterwards, to wit, on Tuesday, the 15th day of January, 1889, the same being the 60th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

56 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH *et al.*
vs.
M. B. HOLMES *et al.* } No. 1417.

JANUARY 15, 1889.

Now, at this day, come the plaintiffs, by Mr. Lewis B. Cox and Mr. Rufus Mallory, of counsel, and the defendants, by Mr. P. L. Willis and Mr. William R. Willis, of counsel, and, the jury empanneled herein being present and answering to their names, the trial of this cause proceeds, and the jury, having the evidence adduced, the arguments of counsel, and the instructions of the court, retire in charge of proper sworn officers to consider of their verdict.

57 And afterwards, to wit, on Wednesday, the 16th day of January, 1889, the same being the 61st judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

58 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH *et al.*
vs.
M. B. HOLMES *et al.* } No. 1417.

JANUARY 16, 1889.

Now, at this day, comes into court the jury heretofore empanelled in this cause and, through their foreman, state to the court that they are unable to agree upon a verdict in this cause; whereupon it is ordered that the said jury be, and they are hereby, discharged from fu-ther consideration in this cause.

59 And afterwards, to wit, on Monday, the 27th day of May, 1889, the same being the 26th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

60 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH *et al.*
vs.
M. B. HOLMES *et al.* } No. 1417.

MAY 27, 1889.

Now, at this day, come the plaintiffs, by Mr. Lewis B. Cox, of counsel, and the defendants, by Mr. P. L. Willis, of counsel, and, on motion of said plaintiffs, it is ordered that this cause be, and the same is hereby, set for trial on Thursday, June 13, 1889.

61 And afterwards, to wit, on the 17th day of June, 1889, there was duly filed in said court a stipulation in words and figures as follows, to wit:

62 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH *et al.*, Plaintiffs,
vs.
M. B. HOLMES *et al.*, Defendants. } No. 1417.

It is hereby stipulated and agreed between the parties to this action, plaintiff and defendant, that it be taken as an admitted fact upon the trial of this cause that a certain stock book of the Grange Business Association of Douglas County, Oregon, containing a number of signatures of one George W. Jones, was with the personal effects of W. F. Owens, deceased, at the time of his death, and so came into the hands of his administrator.

COX AND TEAL,
Of Plaintiffs' Attorneys.
P. L. WILLIS,
Of Att'ys for Def'ts.

Endorsed: Filed June 17, 1889. R. H. Lamson, clerk.

63 And afterwards, to wit, on Monday, the 17th day of June, 1889, the same being the 41st judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

64 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH *et al.*
vs.
M. B. HOLMES *et al.* } No. 1417.

JUNE 17, 1889.

Now, at this day, come the plaintiffs, by Mr. L. B. COX, Mr. Joseph N. Teal, and Mr. Rufus Mallory, of counsel, and the defendants, by Mr. W. R. Willis and Mr. P. L. Willis, of counsel; and, this being the day set for the trial of this cause, now come the following-named jurors to try the issue joined, viz., Jacob Wisecarver, John H. Cameron, John J. Henderson, B. J. Grimm, L. C. Kinney, R. Dunn, John Hughes, B. P. Cardwell, Jos. Copeland, James Dart, J. H. Ewing, and C. R. Downey, twelve good and lawful men of the district, who, being duly empanelled and sworn, proceed to hear the evidence adduced; and, the hour of adjournment having arrived, the trial of this cause is continued until to-morrow.

65 And afterwards, to wit, on Tuesday, the 18th day of June, 1889, the same being the 42d judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

66 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH AND COMPANY *vs.* M. B. HOLMES *et al.* } No. 1417.

JUNE 18, 1889.

Now, at this day, come the plaintiffs, by Mr. Lewis B. Cox, Mr. Joseph N. Teal, and Mr. Rufus Mallory, of counsel, and the defendants, by Mr. W. R. Willis and Mr. P. L. Willis, of counsel, and, the jury empannelled herein being present and answering to their names, the trial of this cause proceeds, and the jury, having heard the evidence adduced, the arguments of counsel, and the instructions of the court, retire in charge of proper sworn officers to consider of their verdict, and, after being out a short time, return into court the following verdict, viz:

"We, the jury in the above-entitled action, find for the plaintiffs and against the defendants for the sum of ten thousand dollars ($10,000.00), with interest at the rate of ten per cent. per annum from date of note.

JOHN HUGHES, *Foreman.*"

Which verdict is received by the court and ordered to be filed.

67 And afterwards, to wit, on the 18th day of June, 1889, there was duly filed in said court a verdict in words and figures as follows, to wit:

68 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH and MAX GOLDSMITH, Partners under the Firm Name of L. Goldsmith and Co., Plaintiffs, *vs.* M. B. HOLMES, JOHN DILLARD, and R. PHIPPS, Defendants.

We, the jury in the abeve-entitled action, find for the plaintiffs and against the defendants for the sum of ten thousand dollars, with interest at the rate of ten per cent. per annum from date of note.

JOHN HUGHES, *Foreman.*

MEMORANDUM.—Date of note is Aug. 9, 1886.

R. H. L., *Clk.*

Endorsed: Filed June 18, 1889. R. H. Lamson, clerk.

69 And afterwards, to wit, on Wednesday, the 19th day of June, 1889, the same being the 43rd judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

70 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH and MAX GOLDSMITH, Partners under the Firm Name of L. Goldsmith & Co., *vs.* M. B. HOLMES, JOHN DILLARD, and R. PHIPPS. } No. 1417.

JUNE 19, 1889.

Now, at this day, come the plaintiffs, by Mr. Lewis B. Cox, of counsel, and the defendants, by Mr. W. R. Willis, of counsel, and thereupon said plaintiffs move the court for judgment upon the verdict heretofore found herein and for an order of sale of the property of the defendants heretofore attached in this cause. It is therefore considered that said plaintiffs do have and recover of and from the defendants the sum of ten thousand dollars, with interest thereon, at the rate of ten per cent. per annum, from the date of the note sued on in this cause, to wit, August ninth, eighteen hundred and eighty-six, in all twelve thousand eight hundred and sixty-one dollars and ten cents, together with their costs and disbursements herein, taxed at seventeen hundred and fifty dollars and six cents; and it appearing to the court that certain property belonging to said defendants has been dul*t* attached in this cause and has not been released from such attachment, said property being de-

71 scribed as follows, to wit:

The following-described property, attached in this cause at the hour of 9.40 o'clock a. m., on November 19, 1887, belonging to the defendant John Dillard, to wit: The donation land claim of John Dillard and wife, certificate number 838, notification No. 3197, and partly described as being the north half of section 28 and the east half of section 29, in township 28 south, of range 6 west, of the Willamette meridian, in Douglas county, Oregon, containing 640 acres, more or less; also begin-ing at the southeast corner of section 20, in township 28 south, range 6 west, running thence west 23 chains; thence north 4.35 chains; thence east 23 chains; thence south 4.35 chains to place of begin-ing, containing 10 acres; also lots 1 and 2, in section 29, township twenty-eight south, of range 6 west, of the Willamette meridian, containing 14.47 acres; also the southwest quarter of the southwest quarter of section 32, township 28 south, range 6 west, of the Willamette meridian, containing 40 acres, in Douglas county, Oregon.

Also the following-described property, belonging to the defendant M. B. Holmes, attached in this cause at the hour of three o'clock p. m., on November 19, 1887, to wit: The north half of the southwest quarter and the southeast quarter of the northwest quarter of sec-

tion 25, containing 120 acres, and the north half of the northwest quarter of section 25, containing 80 acres, and the southwest quarter of the northwest quarter of section 25, containing 40 acres, all in township 29 south, of range 9 west; also the donation land claim of Adam Day, claim 44, notification No. —, being part of section 26, in township 29 south, of range 9 west, and begin-ing at the southeast corner of section 26, township 29 south, of range 9 west; thence north 56.50 chains; thence west 56.50 chains; thence south 56.50 chains; thence east 56.36 chains to the place of begin-ing, containing 18.83 acres; also the fractional
72 northeast quarter and the fractional east half of northwest quarter of fractional northeast quarter of southwest quarter of section 26, township 29 south, of range 9 west, containing 158.80 acres; also the south half of the southwest quarter of section 25, in township 29 south, of range 9 west, containing 80 acres; also the northeast quarter of the northwest quarter of section 35, in township 29 south, of range 9 west, containing 40 acres; also lots 1, 2, and 3 and the northwest quarter of the southeast quarter and 5.50 acres in the north part of the southwest quarter of the southeast quarter and lot 4 and the undivided two-sixths interest in and to the west half of the northeast quarter, all being in section 25, in township 29 south, of range 9 west; also the west half of the southwest quarter, the southeast quarter of the southwest quarter of section 8, and lots 1 and 2 of section 17, in township 29 south, of range 8 west, containing 152.96 acres; also three-sixths of the west half of the northeast quarter of section 25, in township 29 south, of range 9 west, containing 40 acres; all in Douglas county, Oregon.

Also the following property, belonging to the defendant Robert Phipps, attached in this cause at the hour of 9 o'clock a. m., on November 21, 1887, to wit: The southeast quarter of the northeast quarter of section 4 and the fractional south half of the northwest quarter of section 3, in township 29 south, of range 6 west, containing 97.50 acres; the west half of the northwest quarter of section 11 and the east half of the northeast quarter of section 10, in township 29 south, of range 6 west; also D. C. 41, in township 28 south, of range 6 west, begin-ing at a point 12 chains north and 9.25 chains east from the southwest corner of section 33, running thence north 40 chains; thence east 40 chains; thence south 40 chains, and thence north 89 degrees and 34 minutes west 39.56 chains to place
73 of begin-ing; the southwest quarter of the southeast quarter, the southeast quarter of the northwest quarter, and the east half of the southwest quarter of section 11, in township 29 south, of range 5 west, containing 160 acres; also a peice begin-ing at the northwest corner of the southwest quarter of the northwest quarter of section 14, in township 29 south, of range 5 west, running thence south 15 chains; thence east 13.33 chains; thence north 15 chains; thence west 13.33 chains to the place of begin-ing, containing 20 acres; also a tract begin-ing at a point 20 chains south of one-quarter post on north bound-ry of section 14, in township 29 south, of range 5 west, running thence south 15 chains; thence west 26.78 chains; thence north 15 chains; thence east 26.78 chains to place of

begin-ing, containing 40 acres; also the northeast quarter of the northwest quarter of section 14, in township 29 south, of range 5 west; the southwest quarter of the southwest quarter of section 11 and the northwest quarter of the northwest quarter of section 14, in township 29 south, of range 5 west; also the donation claim of R. Phipps No. 37, in township 29 south, of range 6 west; also donation claim No. 42, in township 28 south, of range 6 west, containing 163 acres; also the donation claim of R. M. McKee, in townships 28 and 29 south, of range 6 west, containing 147.22 acres; also the southeast quarter of section 28, the fractional northeast quarter of section 33, the northwest quarter of fractional southwest quarter, the north half of the southeast quarter, the northwest quarter of the northeast quarter of section 34, the west half of the east half and the northeast quarter of the northeast quarter of section 27, in township 28 south, of range 6 west; also the south half of the southeast quarter of section 34, in township 28 south, of range 6 west; also the north half of the southeast quarter and lot 1 of section 3, in township 29 south, of range 6
74 west, containing 160.88 acres; also the southwest quarter of section 27, in township 28 south, of range 6 west; also the following property, attached in this cause at the hour of 12 o'clock noon on said November 21, 1887, belonging to said defendant Robert Phipps, to wit: All of the northwest quarter of section 27, in township 28 south, of range 6 west, that lies south of the South Umpqua river; also the following property, belonging to said defendant Robert Phipps, attached in this cause on said last above-named day and hour, to wit: All that piece of land described as follows: The fractional northeast quarter of the southwest quarter of section 14, in township 28 south, of range 6 west; also donation claim No. 44, being parts of section- 13 and 14, in township 28 south, of range 6 west, of Stephen Marsh and wife; also one undivided one-seventh interest in the south half of donation claim — W. R. Foster, being donation claim No. 45, in township 28 south, of range 6 west; also the north half of the northwest quarter of section 14 and lots 2 and 3 in said section 14, the northeast quarter of the northeast quarter of section 23, and the west half of the northeast quarter of the southwest quarter of section 24, all in township 28 south, of range 6 west; also the south half of donation claim No. 45 of W. R. Foster, in township 28 south, of range 6 west; the south half of the northwest quarter and lots 2 and 3 in section 14, the northeast quarter of the northeast quarter of section 23, and the west half of the northeast quarter of the southwest quarter of section 24, in township 28 south, of range 6 west; the northeast quarter of the northwest quarter of section 14, the west half of the northeast quarter of the northwest quarter of section 24, in township 28 south, of range 6 west, all of said lands being situate in Douglas county, State of Oregon —

It is ordered that said property be sold in the manner prescribed by law and that the proceeds thereof be applied in the payment of this judgment.

75 And afterwards, to wit, on the 22d day of June, 1889, there was duly filed in said court a cost bill in words and figures as follows, to wit:

76 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH and MAX GOLDSMITH, Partners under the Firm Name of L. Goldsmith and Co., Plaintiffs,
vs.
M. B. HOLMES, JOHN DILLARD, and R. PHIPPS, Defendants. } No. 1417.

Statement of costs and disbursements claimed in the above-entitled cause, viz:

Clerk's fees								$46 30
Marshal's fees								166 36
Attorneys' fees								1,000 00
Reporter's fees								50 00
Witnesses' fees, first trial:								
Hyman Abrams,	1	day,	1	mile				1 60
B. Goldsmith,	"	"	"	"				1 60
A. B. McAlpin,	"	"	"	"				1 60
Edward Failing,	"	"	"	"				1 60
George W. Jones,	3	"	200	"				24 50
J. S. Fitzhugh,	1	"	"	"	half	mileage		11 50
V. L. Arrington,	2	"	"	"	"			13 00
D. S. Bruick,	2	"	"	"	"			13 00
Simon Caro,	"	"	"	"	"			13 00
B. Brockway,	2	"	326	"	"			19 30
Nancy L. Owens,	"	"	200	"	"			13 00
Effie Owens,	"	"	"	"	"			13 00
W. Isaacs,	"	"	"	"	"			13 00
Witnesses' fees, second trial:								
Hyman Abrams,	1	day,	1	mile				1 60
B. Goldsmith,	"	"	"	"				1 60
J. J. Chappell,	"	"	"	"				1 60
Charles Y. Lamb,	"	"	"	"				1 60
Edward Failing,	"	"	"	"				1 60
George W. Jones,	"	"	200	"				21 50
J. S. Fitzhugh,	2	"	"	"				23 00
B. Brockway,	1	"	"	"				21 50
V. L. Arrington,	2	"	"	"				23 00
Simon Caro,	2	"	"	"				23 00
D. S. K. Bruick,	2	"	"	"				23 00
E. G. Hursh,	2	"	357	"				38 70
Nancy L. Owens,	2	"	200	"				23 00
Effie Owens,	2	"	"	"				23 00

W. Isaacs,	2 day-,	210 mile-			24 00
J. W. Pitman,	2	"	"	"	24 00
Mary Jane Pitnam,	2	"	"	"	24 00
George Yarbrogh,	2	"	"	"	24 00
A. W. Akers,	2	"	"	"	24 00
Total					1,750 06

77 STATE OF OREGON, } ss:
Multnomah County, }

I, B. Goldsmith, being first duly sworn, say I am the agent for the plaintiffs in the above-entitled cause and make this verification on their behalf; that neither of the plaintiffs is within the district of Oregon; that the costs and disbursements set forth above have been necessarily incurred in the prosecution of this suit, and the plaintiffs are entitled to recover the same from the defendants.

B. GOLDSMITH.

Subscribed and sworn to before me this 20th day of June, A. D. 1889.

[L. S.] JOSEPH N. TEAL,
Notary Public for Oregon.

Endorsed: Filed June 22, 1889. R. H. Lamson, clerk.

78 And afterwards, to wit, on Monday, the 24th day of June, 1889, the same being the 45th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

79 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH AND CO. }
vs. } No. 1417.
M. B. HOLMES *et al.* }

JUNE 24, 1889.

Now, at this day, on motion of Mr. P. L. Willis, of counsel for the defendants, it is ordered that said defendants be, and they are hereby, allowed thirty days from this date in which to file a bill of exceptions herein.

80 And afterwards, to wit, on the 26th day of July, 1889, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit:

81 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH and MAX GOLDSMITH, Partners under the Firm Name of L. Goldsmith & Co., Plaintiffs,
vs.
M. B. HOLMES, JOHN DILLARD, and R. PHIPPS, Defendants.

At a regular term of the above-entitled court, held at the city of Portland, in said district, come the said M. B. Holmes, John Dillard, and R. Phipps, by P. L. Willis, their attorney, on the — day of ——, 1889, and say that in the record and proceedings in the above-entitled cause and in the trial thereof and giving judgment therein there are manifest errors in this, to wit:

1st. The court erred in overruling the demurrer of the defendants to the amended complaint therein because the court had no jurisdiction either of the subject of the action or of the persons of either of the defendants, and said amended complaint did
82 not state facts sufficient to constitute a cause of action.

2nd. The court erred in permitting the witness H. Abraham to testify as to what was said by and between the witness and B. Goldsmith and W. F. Owens in the absence of and without the hearing of the defendants.

3rd. The court erred in permitting the witness H. Abraham to testify as to what W. F. Owens wanted with the money he borrowed on the note sued on herein.

4th. The court erred in permitting the witness H. Abraham to testify as to what were the relations between the defendants and W. F. Owens.

5th. The court erred in admitting as evidence the book of certificates of stock in the Grange Business Association.

6th. The court erred in permitting the witness J. S. Fitzhugh or either of the witnesses B. Brockway, V. L. Arrington, S. Caro, D. S. K. Buick, or E. G. Hirsh to testify as to whether he would act upon the signatures of the defendants attached to the note sued on if they came to him in an ordinary business transaction.

83 7th. The court erred in requiring or permitting the witness M. B. Holmes to testify as to whether the name signed to the deed to Mrs. Palmer was his signature, and also in requiring or permitting either of the witnesses, John Dillard or R. Phipps to testify as to the genuineness of their respective signatures, to be used on the trial of the cause as comparison papers, and in admitting such deed and such papers in evidence as or for comparison papers or at all.

8th. The court erred in admitting in evidence either of the two letters which were admitted to be in the handwriting of W. F. Owens, one of which was dated August 5, 1886, and the other dated Sept. 18, 1886, as exemplars of Owens' handwriting.

9th. The court erred in permitting the witness Edward Failing to testify that the signature of Geo. W. Jones was as succeptible of imitation as that of either of the names to the note.

10th. The court erred in permitting the witness Edward
84 Failing to testify that taking the handwriting shown in the two letters admitted as exemplars of Owens' handwriting as the ordinary handwriting of W. F. Owens he, witness, did not think Owens could counterfeit the signatures on the note sued on.

11th. The court erred in admitting in evidence the note sued on.

Wherefore the said defendants, M. B. Holmes, John Dillard, and R. Phipps, and each of them, pray that the judgment aforesaid for the errors aforesaid and other errors in the record and proceedings therein may be reversed, annulled, and altogether held for naught, and that said defendants and each of them may be restored to all things which they have or either of them has lost by occasion of said judgment.

P. L. WILLIS,
Attorney for Defendants.

STATE OF OREGON, }
County of Multnomah, } *ss:*

Due service of the within assignment of errors is hereby accepted at Portland, Oregon, this 26 day of July, 1889, by receiving a copy thereof, duly certified to as such by P. L. Willis, of counsel for def'ts.

LEWIS B. COX,
Of Attorneys for Pl'ffs.

Endorsed: Filed July 26, 1889. R. H. Lamson, clerk.

85 And afterwards, to wit, on the 27th day of July, 1889, there was duly filed in said court a bond on writ of error in words and figures as follows, to wit:

86 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH and MAX GOLDSMITH, Partners as L. Goldsmith & Company,
vs.
M. B. HOLMES, JOHN DILLARD, and R. PHIPPS. } No. 1417.

Know all men by these presents that we, M. B. Holmes, John Dillard, and R. Phipps, defendants, and G. W. Genger, John Emmitt, M. Josephson, G. A. Taylor, John Rast, T. J. Singleton, Thos. Smith, and J. O. Booth, sureties, are held and firmly bound unto L. Goldsmith and Max Goldsmith, partners as L. Goldsmith and Company, in the sum of twenty thousand dollars, to be paid to the said L. Goldsmith and Max Goldsmith, partners as L. Goldsmith & Company, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this twenty-seventh day of June, 1889.

Whereas the above-named M. B. Holmes, John Dillard, and R. Phipps, defendants, have sued out a writ of error — the Supreme Court of the United States to reverse the judgment in the above-entitled cause by the circuit court of the United States for the district of Oregon:

Now, therefore, the condition of this obligation is such that if the above-named M. B. Holmes, John Dillard, and R. Phipps shall prosecute said writ of error to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

G. A. TAYLOR.	[SEAL.]
JOHN RAST.	[SEAL.]
T. J. SINGLETON.	[SEAL.]
THOS. SMITH.	[SEAL.]
M. B. HOLMES.	[SEAL.]
JOHN DILLARD.	[SEAL.]
R. PHIPPS.	[L. S.]
G. W. GENGER.	[L. S.]
JOHN EMMITT.	[L. S.]
M. JOSEPHSON.	[SEAL.]
J. O. BOOTH.	[SEAL.]

Signed, sealed, and delivered in presence of—
J. F. HAMILTON.
WM. R. WILLIS.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, G. W. Genger, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and freeholder within said district, and that I am worth, in property situate therein, the sum of five thousand dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

G. W. GENGER.

Subscribed and sworn to before me this 27th day of June, A. D. 1889.

J. F. HAMILTON,
U. S. Commissioner.

Approved July 27th, 1889.
(Signed) DEADY, *J.*

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, John Emmitt, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and freeholder within said district, and that I am worth, in property situated therein, the sum of five thousand dollars over and above all my

just debts and liabilities, exclusive of property exempt from execution.

JOHN EMMITT.

Subscribed and sworn to before me this 27th day of June, A. D. 1889.

J. F. HAMILTON,
U. S. Commissioner.

Approved ——, 188–.

87 UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, M. Josephson, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and freeholder within said district, and that I am worth in property situated therein the sum of five thousand dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

M. JOSEPHSON.

Subscribed and sworn to before me this 27th day of June, A. D. 1889.

J. F. HAMILTON,
U. S. Commissioner.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, G. A. Taylor, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and freeholder within said district, and that I am worth in property situated therein the sum of five thousand dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

G. A. TAYLOR.

Subscribed and sworn to before me this 27th day of June, A. D. 1889.

J. F. HAMILTON,
U. S. Commissioner.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, John Rast, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and freeholder within said district, and that I am worth in property situated therein the sum of five thousand dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

JOHN RAST.

88 Subscribed & sworn to before me this 27th day of June, A. D. 1889.

J. F. HAMILTON,
U. S. Commissioner.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, T. J. Singleton, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and freeholder within said district, and am worth in property situated therein the sum of five thousand dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

T. J. SINGLETON.

Subscribed & sworn to before me this 27th day of June, A. D. 1889.

J. F. HAMILTON,
U. S. Commissioner.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, Thomas Smith, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and freeholder within said district, and that I am worth in property situated therein the sum of five thousand dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

THOMAS SMITH.

Subscribed & sworn to before me this 27th day of June, A. D. 1889.

J. F. HAMILTON,
U. S. Commissioner.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, J. O. Booth, being duly sworn, depose and say that I am one of the sureties in the foregoing bond, and that I am a resident and freeholder within said district, and that I am worth in property situated therein the sum of five thousand dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

J. O. BOOTH.

Subscribed and sworn to before me this 27th day of June, A. D. 1889.

J. F. HAMILTON,
U. S. Commissioner.

Endorsed: Filed July 27th, 1889. R. H. Lamson, clerk.

89 And afterwards, to wit, on the 27th day of July, 1889, there was duly filed in said court a bill of exceptions in words and figures as follows, to wit:

90 In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH and MAX GOLDSMITH, Partners under the Firm Name of L. Goldsmith & Co., Plaintiffs,
vs.
M. B. HOLMES, JOHN DILLARD, and R. PHIPPS, Defendants.

Bill of Exceptions.

Be it known that upon the trial of this cause, among other, the following proceedings were had, to wit:

A jury having been empannelled ans sworn to try the issues in said cause, HYMAN ABRAHAM was called and sworn as a witness on behalf of plaintiffs, and in response to the question "Have you seen this note before; and, if so, when and where" (exhibiting to the witness the note set out in the complaint)? the witness answered that he had seen the note before; that W. F. Owens, the payee of the note, wrote the witness in July, 1886, to secure a loan for him, Owens, of $10,000.00, and proposed giving for security for such loan John Dillard, R. Phipps, and G. W. Jones, and that he, witness, called on B. Goldsmith, agent for the plaintiffs, and told him——

(Defendants, by their attorneys, then and there objected to the admission of any conversation between the witness and B. Goldsmith or W. F. Owens, which was not had in the presence or hearing of the defendants or some of them, as irrelevant and incompetent; which objections were overruled by the court; to which ruling of the court the defendants, by their counsel, then and there excepted, and which exception was duly allowed by the court.)

The witness, then continuing, answered that he, witness,
91 told B. Goldsmith that that would be gilt-edge security, and Goldsmith said he would make the loan, and witness then wrote the note sued on and sent it to Owens and wrote Owens what B. Goldsmith said. Owens soon after wrote witness that Jones would not sign the note, but that the defendant Holmes would in his place; that witness then saw B. Goldsmith again and told him what Owens had written, and that he, witness, thought Holmes as good as Jones, and B. Goldsmith then said he would make the loan to Owens on the security of the defendants, Holmes, Dillard, and Phipps. Witness then again wrote Owens what Goldsmith said, and Owens then sent the note in suit, signed and endorsed as it now appears, to witness, who then presented it to B. Goldsmith, and from him as agent and on behalf of the plaintiffs procured the sum named in the note—ten thousand dollars—and placed it in the First National Bank of Portland, Oregon, subject to the order of W. F. Owens.

To all of which defendants, be their counsel, then and there excepted, and their exception was duly allowed by the court.

This was in substance all the evidence given as to the terms of the contract between the plaintiffs and the defendants for the loan of this money or of the transfer of the note in suit to the plaintiffs, except the note itself and the indorsement thereon.

Plaintiffs then asked the same witness:

"What, if you know, did Owens want this money for?"

To which question defendants, by their counsel, then and there objected upon the ground that the question called for irrelevant and immaterial testimony; which objection was overruled by the court.

And witness answered, "As near as I can remember, Owens said he wanted the money to pay on wool in his business."

To which ruling of the court and answer of the witness defendants, by their counsel, then and there excepted, and such exception was duly allowed by the court.

92 Counsel for plaintiffs also asked the same witness: "What, if you know, were the relations between the defendants and W. F. Owens?"

To which question defendants, by their counsel, objected upon the ground that the question called for immaterial testimony; which objection was overruled by the court, and the witness answered: "They were very intimate, particularly Phipps. I saw him at the Grange warehouse in Roseburg frequently for years before this time." The witness also testified that Owens was engaged in conducting business at what was known as the warehouse of the Grange Business Association of Roseburg, Oregon.

To which ruling of the court and answer of the witness defendants then and there excepted, and such exception was duly allowed by the court.

Plaintiffs called GEO. W. JONES, as a witness, and witness was shown a book that purports to be a lot of certificates of stock in the Grange Business Association and asked to state if the signatures of Geo. W. Jones affixed to the stubbs of these certificates were his genuine signatures. Answer: "Yes; I wrote them."

Plaintiffs' counsel then stated to the court: We will tender this and will state as to what we think it proves. We think it is a circumstance to go to the jury, from which they may draw the conclusion of such weight as they may see fit, that Owens, having the promise of money on the signature of Mr. Jones and having in his possession signatures of Jones which were genuine, so that they might have been counterfeited, would have been apt to have counterfeited his signature if he was in that business, and would not have gone off to hunt up the signature of Holmes, and also that we may ask our expert if the name of M. B. Holmes is easier to counterfeit than the name of Geo. W. Jones, and we tender this in evidence for that purpose.

93 It had been stipulated between counsel for plaintiffs and defendants that said book was found among the papers of W. F. Owens after his decease by the administrator of his estate, and the witness Jones had testified concerning the Grange Business Association that it was originally a joint-stock company, formed for the purpose of disposing of farmers' products, chiefly grain and wool, in which interests were held by a great many persons in Douglas county, among others himself; that he was secretary of the organization and as such had charge of this book; that he disposed of his interest in the concern in the year 1878 and turned the book

over to W. F. Owens. This witness also testified that after the original organization of said Grange Business Association had been in existence for a few years a great number of those originally interested in its objects disposed of their interests and retired; that the business was thereafter conducted, so far as he was advised, by W. F. Owens, and he could not say whether other persons continued with him in interest or not.

Defendants, by their counsel, objected that it is immaterial and irrelevant. The court overruled the objection and defendants excepted, and the exception was allowed by the court, and this book was admitted in evidence.

J. S. FITZHUGH was called as a witness by plaintiffs and asked: Are you acquainted with the handwriting of the defendants? Witness answered: I know the handwriting of R. Phipps; have seen him write. I have seen the signature of M. B. Holmes upon which he acted. Witness was shown the note in dispute and asked: "Are the signatures of R. Phipps and M. B. Holmes on this note, in your opinion, the genuine signatures of those parties?" Witness answered that in his opinion they were their genuine signatures.

94 Witness was then asked: "Would you act upon those signatures if they came to you undisputed in an ordinary business transaction?" Defendants, by their counsel, objected that it was immaterial and irrelevant. The court overruled the objection, and defendants then and there excepted, and the exception was allowed by the court, and witness answered that he would act upon those signatures.

The same question (to wit, "Would you act upon those signatures if they came to you undisputed in an ordinary business transaction?") Objection, ruling, exception, allowance, and answer were asked, made, allowed, and received of, in regard to and from each of the witnesses for plaintiffs, to wit, B. Brockway, V. L. Arrington, S. Caro, D. S. K. Buick, and E. G. Hirsh, by the testimony of some of whom the signatures of each of the defendants had been identified.

Plaintiffs called M. B. HOLMES, one of defendants, as a witness and showed witness a deed dated May 14, 1879, purporting to be made by the witness, conveying lands to one Mrs. Palmer and asking the witness, "State whether or not that is your genuine signature on that deed."

Defendants, by their counsel, then and there objected to the question as immaterial and irrelevant. The plaintiffs' counsel then stated that they desired to introduce this evidence and deed for a comparison paper and for no other purpose.

The defendants, by their counsel, objected to the evidence and deed for that purpose upon the ground that plaintiffs could not prove a signature by witness to be used as a comparison paper by the jury or an expert. The objection was overruled by the court, and defendants, by their counsel, then and there excepted, and the exception was allowed by the court. The witness answered that it

was his genuine signature, and the deed was admitted in evidence and used as a comparison paper.

95 A number of other papers with the name of this defendant on them, and the names of each of the other defendants, John Dillard and R. Phipps, respectively (they each being called as witnesses by plaintiffs), were exhibited to each of them, and the same question asked, and the same objection made, and the same ruling of the court, and the same exception allowed by the court, and the same answer given by each of said witnesses, respectively, and said papers were admitted and used as comparison papers.

Plaintiffs' counsel exhibited two letters, one dated Aug. 5, 1886, and one dated Sept. 18, 1886, and defendants' counsel admitted that they are in the handwriting of W. F. Owens. Plaintiffs' counsel then stated: We now offer these in evidence as examples of Mr. Owens' handwriting for the purpose of asking our expert if the man who habitually wrote this hand was capable of forging such signatures as appear to this note in suit. The defendants objected

96 to the admission of the said letters for this or any other purpose as immaterial and irrelevant. The court overruled the objection, and defendants excepted, and the exception was allowed by the court, and the said letters were admitted in evidence.

EDWARD FAILING was called as a witness by plaintiffs and, upon sufficient foundation laid, admitted by the court as an expert in handwriting. The plaintiffs' counsel during the examination of this witness showed witness the book of certificates heretofore admitted in evidence and containing a number of the signatures of Geo. W. Jones, and asked witness to look at the name Geo. W. Jones upon the stubbs written upon this exhibit and state whether or not, in your opinion, that would be an easier name to counterfeit than that of M. B. Holms or otherwise. Defendants, by their counsel, objected to the evidence as immaterial and incompetent. The objection was overruled by the court, and de-

97 fendants excepted, and the exception was allowed by the court, and witness answered that the signature of Geo. W. Jones is as susceptible of imitation as that of either of the names to the note.

The witness is shown the two letters admitted as examples of Mr. Owens' handwriting, and asked to state whether or not, taking the handwriting there shown as the ordinary handwriting of W. F. Owens, you believe he could have forged the names upon the note in dispute so as to correspond so nearly with the names upon the comparison papers. Defendants objected to same as immaterial and incompetent. The objection was overruled by the court, and defendants excepted, and the exception was allowed by the court; and witness answered, I see no evidence in Mr. Owens' writing of any capacity to counterfeit the signatures on the note in question. I think he could not have done so. Owens' endorsements on the notes were proved, as also his death prior to the commencement of the action.

98 Plaintiffs offered the note in dispute in evidence. Defend-

ants objected to the introduction of the note because it is not sufficiently proven and as immaterial and inadmissible because it does not tend to prove the allegations of the complaint, the contract upon which plaintiffs seek to recover being an oral contract. The objections were overruled by the court, and defendants excepted. The exception was allowed by the court and the note admitted in evidence.

The foregoing bill of exceptions is allowed and signed this 27th day of July, 1889, and is directed to be filed as a part of the record in the above-entitled cause.

(Signed) DEADY, *J.*

We hereby stipulate that the foregoing bill of exceptions, so far as it purports to represent the proceedings had on the trial of the above-entitled cause, is correct.

July 25th, 1889.

LEWIS B. COX,
Of Plaintiffs' Counsel.

Endorsed: Filed July 27, 1889. R. H. Lamson, clerk.

99 UNITED STATES OF AMERICA, } *ss:*
District of Oregon, }

I, R. H. Lamson, clerk of the circuit court of the United States for the district of Oregon, do hereby certify that the foregoing pages numbered one to ninety-eight, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of L. Goldsmith & Co., plaintiffs, and M. B. Holmes, John Dillard, and R. Phipps, defendants and plaintiffs in error, as the same remains of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at Portland, in said district, this July 30, A. D. 1889.

[Seal United States Circuit Court, Oregon.]

R. H. LAMSON, *Clerk,*
By R. B. LAMSON,
Deputy Clerk.

Endorsed on cover: Oregon C. C. U. S. No. 422. M. B. Holmes, John Dillard, and R. Phipps, plaintiffs in error, *vs.* L. Goldsmith and Max Goldsmith, partners under the firm name of L. Goldsmith & Co. Filed September 21, 1889.

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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1892.—Term No. 93.

M. B. Holmes, John Dillard, and R. Phipps, Plaintiffs in Error,

vs.

L. Goldsmith and Max Goldsmith, Partners under the Firm Name of L. Goldsmith and Company.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFFS IN ERROR.

JOHN H. MITCHELL,
Attorney for Plaintiffs in Error.

Press of McGILL & WALLACE, Washington, D. C.

ants objected to the introduction of the note because it is not sufficiently proved and is immaterial and inadmissible because it does not tend to prove the allegations of the complaint, the contract upon which plaintiffs seek to recover being an oral contract. The objections were overruled by the court and defendants excepted. The exception was allowed by the court and the note admitted in evidence.

The foregoing bill of exceptions is allowed and signed this 27th day of July, 1880, and is directed to be filed as a part of the record in the above entitled cause.

DEADY, *J.*

(Signed)

We hereby stipulate that the foregoing bill of exceptions, so far as it purports to represent the proceedings had on the trial of the above entitled cause, is correct.

July 25th, 1880.

LEWIS B. COX,
Of Plaintiffs' Counsel.

Endorsed: Filed July 27, 1880. R. H. Lamson, clerk.

[illegible] STATES OF AMERICA,
District of Oregon.

I, R. H. Lamson, clerk of the circuit court of the United States for the district of Oregon, do hereby certify that the foregoing pages numbered from 1 to [illegible] inclusive, is the true and complete transcript of the record and proceedings had in said court in the case of L. Goldsmith & Co., plaintiffs, and M. B. Holmes, John Dillard, and R. Phipps, defendants and plaintiffs in error, as the same remains of record and on file in my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court at Portland, in said district, this July 30, A. D. 1880.

[Seal U. S. Circuit Court, Oregon.]

R. H. LAMSON, *Clerk.*
By R. B. LAMSON,
Deputy Clerk.

Endorsed on cover: Oregon C. C. U. S. No. 422. M. B. Holmes, John Dillard, and R. Phipps, plaintiffs in error, vs. L. Goldsmith and Max Goldsmith, partners under the firm name of L. Goldsmith & Co. Filed September 27, 1880.

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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1892.—Term No. 93.

M. B. Holmes, John Dillard, and R. Phipps, Plaintiffs in Error,

vs.

L. Goldsmith and Max Goldsmith, Partners under the Firm Name of L. Goldsmith and Company.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFFS IN ERROR.

JOHN H. MITCHELL,
Attorney for Plaintiffs in Error.

Press of McGill & Wallace, Washington, D.C.

Supreme Court of the United States.

OCTOBER TERM, 1892.

M. B. HOLMES, JOHN DILLARD, AND R. PHIPPS,
Plaintiffs in Error,

vs.

L. GOLDSMITH AND MAX GOLDSMITH, partners
under the firm name of L. Goldsmith & Co.

No. 93.

In Error to the Circuit Court of the United States for the District of Oregon.

STATEMENT OF CASE.

This case is here on writ of error to the Circuit Court of the United States for the District of Oregon.

The plaintiffs were at the date of the execution and endorsement of the note on which the action is based, also at the time of its commencement and trial, citizens of the State of New York, while the defendants were all at these several dates citizens of the State of Oregon. It is also a fact that W. F. Owens, the original payee and endorser of the note in question, was also, at the date of the execution thereof, and when the same was endorsed and transferred to plaintiffs, and up to the date of his death, which occurred prior to the commencement of this suit, a citizen of the State of Oregon. (Record, 14.)

The facts upon which the action is based will fully appear in the amended complaint, which is brief, and of which the following is a copy (Record, 13–14):

Amended Complaint.

In the Circuit Court of the United States for the District of Oregon.

L. Goldsmith and Max Goldsmith, partners under the firm name of L. Goldsmith & Co., Plaintiffs,
vs.
M. B. Holmes, John Dillard, and R. Phipps, Defendants.

The above-named plaintiffs, L. Goldsmith and Max Goldsmith, citizens of the State of New York, complain of the above-named defendants, M. B. Holmes, John Dillard, and R. Phipps, citizens of the State of Oregon, and, by way of amended complaint, allege—

That at all the times hereinafter mentioned the plaintiffs were and they now are citizens of the State of New York, and that at all such times the defendants were and they now are citizens of the State of Oregon.

That at all the times hereinafter mentioned the plaintiffs were and they now are partners doing business in the city of New York under the firm name of L. Goldsmith & Co.

That on or about the first day of August, 1886, one W. F. Owens applied to the plaintiffs for a loan of ten thousand dollars ($10,000.00), offering to give therefor a promissory note with such additional parties thereto as should be approved by the plaintiffs; to which application, upon the condition stated, the plaintiffs acceded.

That thereupon, on the 9th day of August, 1886, said Owens procured the defendants to execute and deliver to him their certain promissory note in writing, in words and figures as follows, to wit:

$10,000.00. Portland, Oregon, *August 9th*, 1886.

Six months after date, without grace, we or either of us promise to pay to the order of W. F. Owens ten thousand dollars for value received, with interest from date at the rate of ten per cent. per annum until

paid, principal and interest payable in U. S. gold coin, at the First National bank, in Portland, Oregon; and in case suit is instituted to collect this note or any portion thereof, we promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit.

No. 40190.
Due Feb. 9, '87.

M. B. HOLMES.
JOHN DILLARD.
R. PHIPPS.

That thereupon, on said 9th day of August, said Owens indorsed said note by writing his name in blank upon the back thereof and at the same time subscribed his name to the following indorsement, written upon the back of said note, to wit: "For value received I hereby waive on the within demand notice and protest," and delivered said note to the plaintiffs as security for the repayment of said proposed loan; whereupon said plaintiffs approved and accepted said note and advanced to said Owens the said sum of ten thousand dollars ($10,000.00).

That said defendants executed said note for the accommodation of said Owens to enable him to procure said loan thereon and not otherwise, and that said Owens was, in fact, a maker of said note to the plaintiffs and never had any cause of action thereon against the defendants.

That said note is wholly unpaid.

That one thousand dollars ($1,000.00) is a reasonable attorney's fee in this action.

Wherefore said plaintiffs demand judgment against said defendants for the sum of ten thousand dollars ($10,000.00), with interest thereon, at the rate of ten per cent. per annum, from the 9th day of August, 1886, and for one thousand dollars ($1,000.00), attorney's fee, and for costs and disbursements of this action.

COX, SMITH & TEAL,
Plaintiffs' Attorneys.

STATE OF OREGON, } ss:
Multnomah County. }

I, B. Goldsmith, being first duly sworn, say I am the agent of the plaintiffs in the above-entitled action; that

neither of the plaintiffs is within the State of Oregon; that I know the contents of the foregoing complaint and believe the same to be true.

B. GOLDSMITH.

Subscribed and sworn to before me this 4th day of October, 1888.

SANDERSON REED,
Notary Public for Oregon.

[L. S.]

To this complaint the defendants jointly interposed a demurrer, of which the following is a copy, (Record, 15):

Demurrer to Complaint.

In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH and MAX GOLDSMITH, partners under the firm name of L. Goldsmith & Co., Plaintiffs,
vs.
M. B. HOLMES, JOHN DILLARD, and R. PHIPPS, Defendants.

Now come the defendants above named and demur to the amended complaint filed herein because—

1st. This court has no jurisdiction of the subject of this action.

2d. This court has no jurisdiction of the person of either of these defendants.

3d. The amended complaint does not state facts sufficient to constitute a cause of action.

P. L. WILLIS,
Attorney for Defendants.

The *original* complaint, to which the attention of the court is especially attracted, is found Record 4. To this original complaint defendants interposed a demurrer to the jurisdiction of this court, which demurrer plaintiffs confessed (Record, 12–13) and asked leave to amend—which was granted by the court—whereupon the *amended* complaint, *supra*, was filed.

November 5, 1888, the cause was heard upon the demurrer to the amended complaint, and on consideration the demurrer was overruled, the court holding the complaint sufficient.

The court (Deady, J.) filed an opinion in support of this decision, of which the following is a copy (Record, 17, 18):

Opinion.

DEADY, *J.*:

This action is brought by the plaintiffs, citizens of New York, against the defendants, citizens of Oregon, to recover the contents of a promissory note made by the latter for $10,000.

It is alleged in the complaint that on or about August 1, 1886, W. F. Owens applied to the plaintiffs for a loan of $10,000, and offered to give therefor a promissory note, with such additional parties thereto as should be approved by the plaintiffs, to which application, on the conditions stated, the plaintiffs acceded; that thereupon, on August 9, 1886, Owens procured the defendants to "execute" and deliver to him a promissory note for that sum, payable with interest in six months to his order and signed by them as makers; that thereafter Owens endorsed said note by writing his name in blank thereon, and at the same time subscribed his name to the following endorsement thereon: "For value received, I hereby waive on the within demand notice and protest," and delivered the same to the plaintiffs as security for the payment of the proposed loan, whereupon the plaintiffs accepted said note and advanced thereon to Owens the sum of $10,000; that the defendants "executed" said note for the accommodation of Owens, to enable him to procure said loan thereon and not otherwise, and the latter was, in fact, the maker of the said note to the plaintiffs, and never had any cause of action thereon against the defendants, and that said note is wholly unpaid.

The defendants demur to the complaint for that (1) the court has no jurisdiction of the subject of the action nor the persons of the defendants therein, and (2) the facts stated do not constitute a cause of action.

On the argument of the demurrer counsel for the defendants relied solely on the point that under section 1 of the act of 1887 (24 Stat., 553) this court has no jurisdiction of this action to recover the contents of the note in question, because an action could not have been maintained herein for such purpose "if no assignment or transfer" thereof had been made to them.

It is admitted that Owens is dead and that in his lifetime he was a citizen of Oregon, and that, the complaint being silent as to his citizenship, he must, for the purposes of this demurrer, be presumed to have been a citizen of Oregon at the time of the delivery of the note to the plaintiffs. (See Morgan *v.* Gay, 19 Wall., 81.)

On the facts stated in the complaint counsel for the plaintiffs contend that the case is not within the purview of the statute; that Owens was not the assignor of this note, but a joint maker with the defendants; that the plaintiffs are, in point of fact, the payees of the note and the first holders of the same for value, and that it was first put in circulation when delivered to them, and has never been assigned to any one.

The plain purpose of the statute is to prevent the holder of a promissory note or other chose in action, who, by reason of the citizenship of the parties thereto, can not sue those liable to him thereon in the United States Circuit Court, from assigning or transferring the same to some one who can do so.

The note had no existence as a legal obligation until it was delivered to the plaintiffs. Prior to that it was but an inchoate instrument, which could only become binding by passing into the hands of a *bona fide* holder for value. (Brummel *v.* Enders, 18 Gratt., 894.)

It was made by the defendants for the accommodation of Owens, and until he wrote his name on it and delivered it to the plaintiffs no one was liable on it or could maintain an action thereon. It was in fact Owens' own note, with these defendants as his co-makers and sureties, on which he borrowed the money of the plaintiffs and of which he was to all intents and purposes the maker.

Although an indorser in form, the law regards him as a maker, and therefore the holder of the instrument was not bound to give Owens notice of the non-payment thereof by the defendants, even if he had not expressly waived the same. (2 Dan. Neg. Inst., § 1085.)

The true relations between the parties to a negotiable instrument are not conclusively shown by its form, and therefore it may be proved by parol that they are otherwise. (Brummel *v.* Enders, 18 Gratt., 905; Harris *v.* Brooks, 21 Pick., 195; Smith *v.* Morrill, 58 Maine, 48; Susquehanna B. & B. Co. *v.* Evans, 4 Wash. C. C., 480; Hubbard *v.* Gurney, 64 N. Y., 457; Sweet *v.* McAllister, 4 Allen, 353; 1 Dan. Neg. Inst., § 723; 2 Whar. Ev., § 1059.)

For instance, it is said in the last case cited that it may be shown "that the payee or indorsee was the real principal, or that all the parties were joint principals or some of them joint sureties," citing Clapp *v.* Rice, 13 Gray, 403.

So, in this case, if Owens had paid this note when it became due and then brought an action as payee thereof to recover the amount from the defendants as makers of the same, they might have shown by parol the true relation between themselves and Owens; that he was in fact the principal in and maker of the note and received the money thereon, and that they were only his sureties, and thus defeat the action.

Is there any good reason why the plaintiff may not, for the purpose of maintaining this action in this court, show that notwithstanding the form of the note they are in fact the payees of the same; that it has never been really assigned to any one, but was put in circulation by delivery to them by Owens, one of the makers thereof, for money then loaned to him? I can conceive of none, nor has any been suggested in the argument.

The jurisdiction of this court is presumably a beneficial one, and therefore the law conferring it is not to be strictly construed, but rather the exception to it. The exercise of this jurisdiction tends to promote confidence and commercial intercourse between the citizens of the several States of the Union by furnishing them a comparatively impartial tribunal wherein to adjudicate and enforce the controverted and unsatisfied claims growing out of such intercourse.

The facts showing the true relations between the parties to this note may, as between themselves, be alleged and proven by parol, for any purpose affecting either of their rights or liabilities thereon. The right of the plain-

tiffs "to recover the contents" of this note from the defendants by an action in this court and the liability of the defendants therein are among these rights and liabilities. Therefore when it is necessary, to maintain the jurisdiction of the court in such an action, to show that the plaintiff, who, upon the face of a note, is in form an endorsee or assignee thereof, is in fact the payee of the same, it may be done.

On the facts stated in the complaint the plaintiffs are the payees and first holders of this note. There never was any assignment of it, and the case does not come within the restriction of the judiciary act, nor the reason of it.

The demurrer is overruled.

Mr. Lewis B. Cox for the plaintiffs.

Mr. Parish L. Willis for the defendants.

(S'g'd) MATTHEW P. DEADY,
U. S. District Judge, Oregon.

Defendants having leave to answer over, on November 27, 1888, filed a joint answer, of which the following is copy (Record, 20):

Answer.

In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH and MAX GOLDSMITH, partners under the firm name of L. Goldsmith & Co., Plaintiffs,
vs.
M. B. HOLMES, JOHN DILLARD, and R. PHIPPS, Defendants.

The above-named defendants, M. B. Holmes, John Dillard, and R. Phipps, for answer to the amended complaint of plaintiffs filed herein, say:

As to whether on or about the first day of August, 1886, or at any other time, one W. F. Owens applied to the plaintiffs for a loan of $10,000.00, or offered to give therefor a promissory note, with such additional parties thereto as should be approved by the plaintiffs, or any promissory note, or to which or to any application plaintiffs acceded, these defendants and each of them deny

any knowledge or information thereof sufficient to form a belief.

And deny that on the 9th day of August, 1886, or at any other time, said Owens procured the defendants or any or either of them to, or that the defendants or any or either of them did, on the 9th day of August, 1886, or at any other time, either execute or deliver to said Owens or to any other person or persons the promissory note in the complaint described.

And whether or not on the 9th day of August, 1886, or at any other time, said Owens endorsed any note by writing his name in blank upon the back thereof or otherwise, or at the same or any other time subscribed his name to the indorsement in said complaint alleged written upon the back of the alleged or any note, or delivered any note to the plaintiffs as security for the repayment of the proposed loan in complaint alleged or any loan, or for any other purpose, or plaintiffs approved or accepted any note or advanced to said Owens the sum of $10,000.00 or any other sum, these defendants and each of them deny any knowledge or information thereof sufficient to form a belief.

And deny that these defendants or any or either of them executed the note in the complaint set forth, for the accommodation of said Owens or to enable him to procure the loan in said complaint alleged or any loan thereon, or for any other purpose or at all, and deny that said Owens was in fact a maker of said alleged note.

And deny that one thousand dollars or any other sum is a reasonable attorney's fee in this action.

Wherefore these defendants demand judgment against the plaintiffs for costs and disbursements of this action.

W. R. WILLIS and P. L. WILLIS,
Atty's for Def'ts.

The issues thus joined came on for trial before a jury January 14th, 1889 (Record, 22), and on the following, day (Record, 23), the jury being unable to agree, were discharged from the further consideration of the cause.

On June 17, 1889, a stipulation of the parties was filed in the case, of which the following is a copy (Record, 24):

In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH *et al.*, Plaintiffs, *vs.* M. B. HOLMES *et al.*, Defendants. } No. 1417.

It is hereby stipulated and agreed between the parties to this action, plaintiff and defendant, that it be taken as an admitted fact upon the trial of this cause that a certain stock book of the Grange Business Association of Douglass County, Oregon, containing a number of signatures of one George W. Jones, was with the personal effects of W. F. Owens, deceased, at the time of his death, and so came into the hands of his administrator.

COX & TEAL,
Of Plaintiffs' Attorneys.
P. L. WILLIS,
Of Att'ys for Def'ts.

And on the same day the cause came on a second time for trial before a jury (Record, 24), and on June 18 (Record, 25) the jury returned a verdict, of which the following is a copy:

"We, the jury in the above-entitled action, find for the plaintiffs and against the defendants for the sum of ten thousand ($10,000.00) dollars, with interest at the rate of ten per cent. per annum from date of note. John Hughes, foreman."

On June 19th, 1889, on motion of plaintiffs, the court rendered judgment in their favor and against the defendants for the sum of $10,000.00, with interest thereon at the rate of 10 per cent. per annum from the date of the note sued on, to wit, August 9th, 1886, in all $12,861.10, together with their costs and disbursements taxed at $1,750.06, and ordered that certain property which had been attached should be sold and the proceeds applied in payment of the judgment. (Record, 26.)

The time for filing a bill of exceptions having been extended by order of the court, Mr. P. L. Willis, of counsel for the defendants, on the 26th day of July, 1889, filed in said cause in said court an assignment of errors in words and figures as follows (Record, 31–32):

In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH and MAX GOLDSMITH, partners under the firm name of L. GOLDSMITH & Co., Plaintiffs,
vs.
M. B. HOLMES, JOHN DILLARD, and R. PHIPPS, Defendants.

At a regular term of the above-entitled court, held at the city of Portland, in said district, come the said M. B. Holmes, John Dillard, and R. Phipps, by P. L. Willis, their attorney, on the—day of——, 1889, and say that in the record and proceedings in the above-entitled cause and in the trial thereof and giving judgment therein there are manifest errors in this, to wit:

1st. The court erred in overruling the demurrer of the defendants to the amended complaint therein, because the court had no jurisdiction either of the subject of the action or of the persons of either of the defendants, and said amended complaint did not state facts sufficient to constitute a cause of action.

2d. The court erred in permitting the witness, H. Abraham, to testify as to what was said by and between the witness and B. Goldsmith and W. F. Owens in the absence of and without the hearing of the defendants.

3d. The court erred in permitting the witness, H. Abraham, to testify as to what W. F. Owens wanted with the money he borrowed on the note sued on herein.

4th. The court erred in permitting the witness, H. Abraham to testify as to what were the relations between the defendants and W. F. Owens.

5th. The court erred in admitting as evidence the book of certificates of stock in the Grange Business Association.

6th. The court erred in permitting the witness, J. S. Fitzhugh, or either of the witnesses, B. Brockway, V. L. Arrington, S. Caro, D. S. K. Buick, or E. G. Hursh, to

testify as to whether he would act upon the signatures of the defendants attached to the note sued on if they came to him in an ordinary business transaction.

7th. The court erred in requiring or permitting the witness, M. B. Holmes, to testify as to whether the name signed to the deed to Mrs. Palmer was his signature, and also in requiring or permitting either of the witnesses, John Dillard or R. Phipps, to testify as to the genuineness of their respective signatures, to be used on the trial of the cause as comparison papers, and in admitting such deed and such papers in evidence as or for comparison papers or at all.

8th. The court erred in admitting in evidence either of the two letters which were admitted to be in the handwriting of W. F. Owens, one of which was dated August 5, 1886, and the other dated Sept. 18, 1886, as exemplars of Owens' handwriting.

9th. The court erred in permitting the witness, Edward Failing, to testify that the signature of Geo. W. Jones was as susceptible of imitation as that of either of the names to the note.

10th. The court erred in permitting the witness, Edward Failing, to testify that taking the handwriting shown in the two letters admitted as exemplars of Owens' handwriting as the ordinary handwriting of W. F. Owens he, witness, did not think Owens could counterfeit the signatures on the note sued on.

11th. The court erred in admitting in evidence the note sued on.

Wherefore the said defendants, M. B. Holmes, John Dillard, and R. Phipps, and each of them, pray that the judgment aforesaid for the errors aforesaid and other errors in the Record and proceedings therein may be reversed, annulled, and altogether held for naught, and that said defendants and each of them may be restored to all things which they have or either of them has lost by occasion of said judgment.

P. L. Willis,
Attorney for Defendants.

STATE OF OREGON, } ss:
County of Multnomah. }

Due service of the within assignment of errors is hereby accepted, at Portland, Oregon, this 26 day of July, 1889, by receiving a copy thereof, duly certified to as such by P. L. Willis, of counsel for def'ts.

LEWIS B. COX,
Of Attorneys for Pl'ffs.

Subsequently, on July 27, 1889, there was duly filed in the said cause in said court a bill of exceptions, of which the following is a copy (Record, 36–40):

Bill of Exceptions.

In the Circuit Court of the United States for the District of Oregon.

L. GOLDSMITH and MAX GOLDSMITH, partners under the firm name of L. Goldsmith & Co., Plaintiffs,
vs.
M. B. HOLMES, JOHN DILLARD, and R. PHIPPS, Defendants.

Bill of Exceptions.

Be it known that upon the trial of this cause, among others, the following proceedings were had, to wit:

A jury having been empannelled and sworn to try the issues in said cause, HYMAN ABRAHAM was called and sworn as a witness on behalf of plaintiffs, and in response to the question "Have you seen this note before; and, if so, when and where" (exhibiting to the witness the note set out in the complaint)? the witness answered that he had seen the note before; that W. F. Owens, the payee of the note, wrote the witness in July, 1886, to secure a loan for him, Owens, of $10,000.00, and proposed giving for security for such loan John Dillard, R. Phipps, and G. W. Jones, and that he, witness, called on B. Goldsmith, agent for the plaintiffs, and told him—

(Defendants, by their attorneys, then and there objected to the admission of any conversation between the witness and B. Goldsmith or W. F. Owens, which was not had in the presence or hearing of the defendants or some of

them, as irrelevant and incompetent; which objections were overruled by the court; to which ruling of the court the defendants, by their counsel, then and there excepted, and which exception was duly allowed by the court.)

The witness, then continuing, answered that he, witness, told B. Goldsmith that that would be gilt-edge security, and Goldsmith said he would make the loan, and witness then wrote the note sued on and sent it to Owens and wrote Owens what B. Goldsmith said. Owens soon after wrote witness that Jones would not sign the note, but that the defendant Holmes would in his place; that witness then saw B. Goldsmith again and told him what Owens had written, and that he, witness, thought Holmes as good as Jones, and B. Goldsmith then said he would make the loan to Owens on the security of the defendants, Holmes, Dillard, and Phipps. Witness then again wrote Owens what Goldsmith said, and Owens then sent the note in suit, signed and endorsed as it now appears, to witness, who then presented it to B. Goldsmith, and from him as agent and on behalf of the plaintiffs procured the sum named in the note—ten thousand dollars—and placed it in the First National Bank of Portland, Oregon, subject to the order of W. F. Owens.

To all of which defendants, by their counsel, then and there excepted, and their exception was duly allowed by the court.

This was in substance all the evidence given as to the terms of the contract between the plaintiffs and the defendants for the loan of this money or of the transfer of the note in suit to the plaintiffs, except the note itself and indorsement thereon.

Plaintiffs then asked the same witness:

"What, if you know, did Owens want this money for?"

To which question defendants, by their counsel, then and there objected upon the ground that the question called for irrelevant and immaterial testimony; which objection was overruled by the court.

And witness answered, "As near as I can remember, Owens said he wanted the money to pay on wool in his business."

To which ruling of the court and answer of the witness defendants, by their counsel, then and there excepted, and such exception was duly allowed by the court.

Counsel for plaintiffs also asked the same witness, "What, if you know, were the relations between the defendants and W. F. Owens?"

To which question defendants, by their counsel, objected upon the ground that the question called for immaterial testimony; which objection was overruled by the court, and the witness answered: "They were very intimate, particularly Phipps. I saw him at the Grange warehouse in Roseburg frequently for years before this time." The witness also testified that Owens was engaged in conducting business at what was known as the warehouse of the Grange Business Association of Roseburg, Oregon.

To which ruling of the court and answer of the witness defendants then and there excepted, and such exception was duly allowed by the court.

Plaintiffs called GEO. W. JONES as a witness, and witness was shown a book that purports to be a lot of certificates of stock in the Grange Business Association and asked to state if the signatures of Geo. W. Jones affixed to the stubs of these certificates were his genuine signatures. Answer: "Yes; I wrote them."

Plaintiffs' counsel then stated to the court: We will tender this and will state as to what we think it proves. We think it is a circumstance to go to the jury, from which they may draw the conclusion of such weight as they may see fit, that Owens, having the promise of money on the signature of Mr. Jones and having in his possession signatures of Jones which were genuine, so that they might have been counterfeited, would have been apt to have counterfeited his signature if he was in that business, and would not have gone off to hunt up the signature of Holmes, and also that we may ask our expert if the name of M. B. Holmes is easier to counterfeit than the name of Geo. W. Jones, and we tender this in evidence for that purpose.

It had been stipulated between counsel for plaintiffs and defendants that said book was found among the papers of W. F. Owens after his decease by the administrator of his estate, and the witness Jones had testified concerning the Grange Business Association that it was originally a joint-stock company, formed for the purpose of disposing of farmers' products, chiefly grain and wool, in which interests were held by a great many persons in

Douglas County, among others himself; that he was secretary of the organization and as such had charge of this book; that he disposed of his interest in the concern in the year 1878 and turned the book over to W. F. Owens. This witness also testified that after the original organization of said Grange Business Association had been in existence for a few years a great number of those originally interested in its objects disposed of their interests and retired; that the business was thereafter conducted, so far as he was advised, by W. F. Owens, and he could not say whether other persons continued with him in interest or not.

Defendents, by their counsel, objected that it is immaterial and irrelevant. The court overruled the objection and defendants excepted, and the exception was allowed by the court, and this book was admitted in evidence.

J. S. FITZHUGH was called as a witnesss by plaintiffs and asked: Are you acquainted with the handwriting of the defendants? Witness answered: I know the handwriting of R. Phipps; have seen him write. I have seen the signature of M. B. Holmes upon which he acted. Witness was shown the note in dispute and asked: "Are the signatures of R. Phipps and M. B. Holmes on this note, in your opinion, the genuine signatures of those parties?" Witness answered that in his opinion they were their genuine signatures.

Witness was then asked: "Would you act upon those signatures if they came to you undisputed in an ordinary business transaction?" Defendants, by their counsel, objected that it was immaterial and irrelevant. The court overruled the objection, and defendants then and there excepted, and the exception was allowed by the court, and witness answered that he would act upon those signatures.

The same question (to wit, "Would you act upon those signatures if they came to you undisputed in an ordinary business transaction?") Objection, ruling, exception, allowance, and answer were asked, made, allowed, and received of, in regard to and from each of the witnesses for plaintiffs, to wit, B. Brockway, V. L. Arrington, S. Caro, D. S. K. Buick, and E. G. Hursh, by the testimony of *some* of whom the signatures of each of the defendants had been identified.

Plaintiffs called M. B. Holmes, one of the defendants, as a witness and showed witness a deed dated May 14th, 1879, purporting to be made by the witness, conveying lands to one Mrs. Palmer and asking the witness, "State whether or not that is your genuine signature on that deed."

Defendants, by their counsel, then and there objected to the question as immaterial and irrelevant. The plaintiffs' counsel then stated that they desired to introduce this evidence and deed for a comparison paper and for no other purpose.

The defendants, by their counsel, objected to the evidence and deed for that purpose upon the ground that plaintiffs could not prove a signature by witness to be used as a comparison paper by the jury or an expert. The objection was overruled by the court, and defendants, by their counsel, then and there excepted, and the exception was allowed by the court. The witness answered that it was his genuine signature, and the deed was admitted in evidence and used as a comparison paper.

A number of other papers with the name of this defendant on them, and the names of each of the other defendants, John Dillard and R. Phipps, respectively (they each being called as witnesses by plaintiffs), were exhibited to each of them, and the same question asked, and the same objection made, and the same ruling of the court, and the same exception allowed by the court, and the same answer given by each of said witnesses, respectively, and said papers were admitted and used as comparison papers.

Plaintiffs' counsel exhibited two letters, one dated Aug. 5, 1886, and one dated Sept. 18, 1886, and defendants' counsel admitted that they are in the handwriting of W. F. Owens. Plaintiffs' counsel then stated: We now offer these in evidence as examples of Mr. Owens' handwriting for the purpose of asking our expert if the man who habitually wrote this hand was capable of forging such signatures as appear to this note in suit. The defendants objected to the admission of the said letters for this or any other purpose as immaterial and irrelevant. The court overruled the objection, and defendants excepted, and the exception was allowed by the court, and the said letters were admitted in evidence.

EDWARD FAILING was called as a witness by plaintiffs and, upon sufficient foundation laid, admitted by the court as an expert in handwriting. The plaintiffs' counsel during the examination of this witness showed witness the book of certificates heretofore admitted in evidence and containing a number of the signatures of Geo. W. Jones, and asked witness to look at the name Geo. W. Jones upon the stubs written upon this exhibit and state whether or not, in your opinion, that would be an easier name to counterfeit than that of M. B. Holmes, or otherwise. Defendants, by their counsel, objected to the evidence as immaterial and incompetent. The objection was overruled by the court and defendants excepted and the exception was allowed by the court and witness answered that the signature of Geo. W. Jones is as susceptible of imitation as that of either of the names to the note.

The witness is shown the two letters admitted as examples of Mr. Owens' handwriting, and asked to state whether or not, taking the handwriting there shown as the ordinary handwriting of W. F. Owens, you believe he could have forged the names upon the note in dispute so as to correspond so nearly with the names upon the comparison papers. Defendants objected to same as immaterial and incompetent. The objection was overruled by the court and defendants excepted and the exception was allowed by the court and witness answered, I see no evidence in Mr. Owens' writing of any capacity to counterfeit the signatures on the note in question. I think he could not have done so. Owens' endorsements on the notes were proved, as also his death prior to the commencement of the action.

Plaintiffs offered the note in dispute in evidence. Defendants objected to the introduction of the note because it is not sufficiently proven and as immaterial and inadmissible because it does not tend to prove the allegations of the complaint, the contract upon which plaintiffs seek to recover being an oral contract. The objections were overruled by the court, and defendants excepted. The exception was allowed by the court and the note admitted in evidence.

The foregoing bill of exceptions is allowed and signed this 27th day of July, 1889, and is directed to be filed as a part of the record in the above-entitled cause.

(Signed) DEADY, *J.*

We hereby stipulate that the foregoing bill of exceptions, so far as it purports to represent the proceedings had on the trial of the above-entitled cause, is correct.

July 25th, 1889.

LEWIS B. COX,
Of Plaintiffs' Counsel.

From the foregoing judgment, and for the reasons assigned, the cause is now here on writ of error.

The Issues in the Court Below.

The court will have observed that every allegation of the *amended* complaint, both *material* and *immaterial*, are specifically denied in the answer. The principal issues of law and *fact*, therefore, in the court below, were:

1st. Are the material facts averred, or averred and proven, such as to bring the case within the jurisdiction of the Federal Court; and

2d. Are the names of the three defendants signed to the note in question, their genuine signatures, *or* are they, as claimed by them, *forgeries*.

3d. Various questions as to the competency and relevancy of certain evidence on the subject of handwriting.

Assignment of Errors.

FIRST.

The court erred in overruling the demurrer of the defendants to the amended complaint, for the reason that such complaint is insufficient to confer jurisdiction of the subject-matter of the action, or of the persons of the defendants or any of them; and for the further reason that said amended complaint does not state facts suffi-

cient to confer jurisdiction—in this, among other things, that it fails to aver that W. F. Owens, the payee named in the note sued on, was a citizen of a State other than that of the defendants. And also for the reason such complaint does not state facts sufficient to constitute a cause of action.

SECOND.

The court erred in holding that W. F. Owens was a maker and not an indorser within the meaning of the law of the note in question.

THIRD.

The court erred in permitting the witness, Hyman Abraham, to testify as to what W. F. Owens wrote him, the witness, and what he wrote Owens, and as to what was said by and between the witness and B. Goldsmith in the absence of and without the knowledge or hearing of the defendants or any of them, and in not sustaining the objection of defendants' counsel to all such testimony. (Record, 37.)

FOURTH.

The court erred in permitting the witness, Hyman Abraham, to testify as to what W. F. Owens wanted with the money he borrowed on the note sued on, and in not sustaining the objection of defendants' counsel to the question propounded to him: "What, if you know, did witness want this money for?" (Record, 37.)

FIFTH.

The court erred in permitting the witness, Hyman Abraham, to testify as to what were the relations between the defendants and W. F. Owens, and in not sustaining the objections of defendants counsel to the following

question propounded to him: "What, if you know, were the relations between the defendants and W. F. Owens?" (Record, 37.)

SIXTH.

The court erred in not sustaining the defendants' objection to the introduction in evidence of the book purporting to be a lot of certificates of stock in the Grange Business Association, and in admitting such book in evidence, and in admitting the evidence of the witness, Geo. W. Jones, in reference thereto, and to his signature thereon, and in permitting such book to be used by the witness and jury for comparison purposes. (Record, 37.)

SEVENTH.

The court erred in permitting the witnesses, J. S. Fitzhugh, B. Brockway, V. S. Arrington, S. Caro, D. S. K. Buick, and E. G. Hursh, or any of them, to testify as to whether they would act upon the signatures of the defendants attached to the notes sued on if they came to them in an ordinary business transaction. (Record, 38.)

EIGHTH.

The court erred in permitting and requiring the witness, M. B. Holmes, to testify as to whether the name signed to the deed to Mrs. Palmer was his signature, and also in permitting either of the witnesses, John Dillard or R. Phipps, to testify as to the genuineness of their respective signatures to "a number of certain other papers" to be used on the trial of the cause as comparison papers and in admitting such deeds and such "number of other papers" in evidence for comparison purposes, or at all, and in permitting their use as comparison papers. (Record, 38.)

NINTH.

The court erred in admitting in evidence either of the two letters which were admitted to be in the handwriting of W. F. Owens, one of which was dated August 5th, 1886, and the other September 18th, 1886, as exemplars of Owens' handwriting, and in permitting their use by witnesses, court, and jury as comparison papers. (Record, 39.)

TENTH.

The court erred in permitting the witness, Edward Failing, to testify that the signature of George W. Jones was "as susceptible of imitation as that of either of the names to the note, in answer to the question (after being shown the book of certificates referred to and admitted in evidence and being requested to look at the name, Geo. W. Jones, upon the stubs written thereon) as to "whether or not in his opinion that would be an easier name to counterfeit than that of M. B. Holmes, or otherwise," and in not sustaining defendants' objections to such question and answer. (Record, 39.)

ELEVENTH.

The court erred in not sustaining the objection of defendants' counsel to the following question propounded to the witness, Edward Failing: "Look at the name George W. Jones upon the stubs written upon this exhibit (witness having been shown the book of certificates admitted in evidence and containing a number of the *alleged* signatures of George W. Jones) and state whether or not in your opinion that would be an easier name to counterfeit than that of M. B. Holmes, or otherwise," and in permitting the witness to answer said question. (Record, 39.)

TWELFTH.

The court erred in failing to sustain the objection of plaintiffs' counsel to the following question propounded to the expert witness, Edward Failing: "State whether or not, taking the handwriting there shown (the witness having been shown two letters admitted as examples of Mr. Owens' handwriting) as the ordinary handwriting of W. F. Owens, you believe he could have forged the names upon the note in dispute so as to correspond so nearly with the names upon the comparison papers?" and in permitting the witness, Failing, to answer said question. (Record, 39.)

THIRTEENTH.

The court erred in admitting the note in evidence. (Record, 39–40.)

FOURTEENTH.

The court erred in overruling motion of defendants' counsel to set aside the verdict, and in rendering judgment on the verdict.

ARGUMENT.

POINT I.

JURISDICTION OF THE COURT.

The first and second assignments of error will be considered together. These relate to the jurisdiction of the court on the case presented by the amended complaint, irrespective of any testimony in the case.

THE ACT OF CONGRESS.

Section 1 of the act of March 3, 1887, amendatory of the judicial act of March 3, 1875, as corrected by the act

of August 13, 1888 (25 U. S. Stats., 434), provides among other things, as follows:

"Nor shall any circuit or district court have cognizance of any suit except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer * * * unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." * * *

One principal question, therefore, involved in this case and which relates to the jurisdiction of the court, is as to whether the note sued upon comes within the inhibitory provision just quoted.

In other words, is this a suit "to recover the contents of a promissory note" brought by the assignee of the same, the indorser and assignor of which could not, by reason of his citizenship being the same as that of the defendants, have prosecuted a suit to recover on the same in the Circuit Court of the United States for the District of Oregon? It is respectfully submitted that, notwithwithstanding the allegations of the complaint, the suit is of that character just described, and, therefore, the court below was without jurisdiction.

In this connection it is scarcely necessary to state the familiar rule that all facts essential to confer jurisdiction on a Federal court must be made to appear affirmatively by *material* allegations, and in determining the question of jurisdiction every immaterial averment in a complaint, if any, must be eliminated in its consideration. In other words, as stated by Chief Justice Ellsworth in this court so long ago as Turner *v.* The Bank of North America, 4 Dall., 8, "The fair presumption is not as with regard to a Court of General Jurisdiction that a cause is within

its jurisdiction unless the contrary appears, *but rather that a cause is without its jurisdiction till the contrary appears.*"

Turner *v.* Bank of North America, 4 Dall., 8;
Scott *v.* Sandford, 19 How., 393;
Ex parte Smith, 94 U. S., 455.

This same rule was stated and approved by this court, opinion by Mr. Justice Harlan, in King Iron Bridge Co. *v.* Otoe County (120 U. S., 226). Mr. Justice Harlan said:

"This case was argued upon the question of limitation; but we have no occasion to consider that question, for it does not appear that the Circuit Court had jurisdiction of the action. Unless the contrary appears affirmatively from the Record, the presumption upon writ of error or appeal is that the court below was without jurisdiction. (Robertson *v.* Cease, 97 U. S., 646; Grace *v.* American Central Ins. Co., 109 U. S., 278; Bors *v.* Preston, 11 U. S., 252; Continental Life Ins. Co. *v.* Rhodes, 119 U. S., 237.) That the point as to jurisdiction was not made here by either party is immaterial, because as said in Mansfield, etc., Railroad Co. *v.* Swan, 111 U. S., 379–382, 'the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court of its own motion to deny its own jurisdiction, and in the exercise of its appellate power that of all other courts of the United States in all cases where such jurisdiction does not affirmatively appear in the Record on which in the exercise of that power it is called to act. On every writ of error or appeal the first and fundamental question is that of jurisdiction; *first*, of this court, and then of the court from which the Record comes.' See also Hancock *v.* Holbrook, 112 U. S., 229–231."

It is submitted that in the complaint in this case as amended there are a number of *immaterial* and *improper* averments—averments, which were they consistent with the real facts on which the suit is based and in that event pertinent and proper to be pleaded, might present a case cognizable in the Circuit Court, but which, as we shall

claim, being inconsistent with such facts, and therefore immaterial and improper to be pleaded, must be eliminated, and thus the jurisdiction must fail.

In presenting this question, therefore, it is submitted, in the first place, that all those averments in the amended complaint, to the effect that the note in question was executed by the defendants and delivered to W. F. Owens, the payee named therein, solely for his accommodation, and for the purpose of enabling him to procure a loan thereon and not otherwise, and to the effect that said Owens was in fact the *maker* of said note to the plaintiffs, and never had any cause of action thereon against the defendants, are irrelevant, immaterial, and non-issuable averments, and evidence in support of all which was wholly inadmissible for any purpose, and such averments should be so considered and treated by this court in considering the question of jurisdiction involved.

The suit is on a contract or agreement, if such terms may with propriety be applied to a promissory note, in writing, namely a negotiable promissory note, the defendants being the makers, W. F. Owens, the payee and indorser, and the plaintiffs' indorsees or assignees. Whatever rights might attach to the defendants and the payee to show by parol proof under certain circumstances the relations they bore severally to each other, it is submitted that the plaintiffs are not at liberty *for any purpose*, much less for the purpose of making a case conferring jurisdiction on the Circuit Court, to either aver in their complaint or prove by parol a state of case different from that presented by the writings.

In other words, this is a suit brought in a Circuit Court to recover the contents of a promissory note, by the *assignee* thereof, which suit, it is manifest, could *not* have been prosecuted in such court to recover the said contents if no assignment had been made.

In considering this question it may be well to contrast that clau e of section 1 of the act of March 3, 1887, as corrected by the act of August 13, 1888 (U. S. Stats., 25), which bears on the case, with the somewhat similar clause in section 11 of the judiciary act of September 24, 1789 (1st U. S. Stats., 79):

Judiciary Act, Sec. 11, 1789.	Judiciary Act, Sec. 1, 1887.
"SEC. 11. * * * Nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."	"SEC. 1. * * * Nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer, * * * unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." * * *

It will be observed that while the act of 1887 is more restrictive in its provisions than the act of 1789, so as to exclude by specific statement notes payable to bearer, and held by a holder subsequent to the person to whom originally delivered, the two acts are *substantially* and in legal construction and effect precisely similar in so far as they relate to promissory notes other than those payable to bearer.

If any judicial construction, then, has been heretofore placed on this clause in the act of 1789 by this court it must be conceded such construction, unless subsequently overruled, or for good reasons now occurring to this court the same should be overruled or modified, should

be applied to the act of 1887, as it is to be presumed Congress legislated in view of such judicial interpretation.

Fisk *v.* Hanarie, 142 U. S., 459.

This clause of the judiciary act of 1789 was interpreted by this court—first by an opinion delivered by Chief Justice Marshall in the case of Young *v.* Brian *et al.*, 6 Wheat., 146, and the construction then placed upon it was subsequently cited and approved in the following cases:

Mollan *v.* Torrance, 9 Wheat., 537;
Turner *v.* Bank of North America, 4 Dall., 8;
Montalet *v.* Murray, 4 Cranch, 46;
Evans *v.* Gee, 11 Peters, 80;
Phillips *v.* Preston, 5 How., 278;
Bank of the United States *v.* Mass., 6 *Id.*, 31;
Coffee *v.* The Planters Bank of Tennessee, 13 *Id.*, 183;
Keary *v.* The Farmers' and Mechanics' Bank of Memphis, 16 Peters, 94.

These authorities, and they do not seem to have been overruled, lay down very clearly and without qualification the *two* following propositions:

1. That under this clause of the judiciary act of 1789, an indorsee of a promissory note may bring a suit in the Circuit Court to recover the contents thereof *against the immediate indorser* and a citizen of a different State, whether a suit could be brought in such court by such indorser against the maker or not. That in such a case the indorsee does not claim through an assignment. It is a new contract entered into by the indorser and indorsee upon which the suit is brought; and

2. That in a suit brought in a Circuit Court to recover the contents of a promissory note by the indorsee against either the *maker* or a *remote* indorser, it is necessary, in order to confer jurisdiction, to aver in the complaint the

fact that the *payee* or *promissee* named in such note is a citizen of a State *other* than that of which the maker of the note is a citizen.

The case at bar, the court will bear in mind, is a suit brought by the indorsers, *not* against an *indorser*, either *immediate* or *remote*, but against the *makers* of the note, the payee or indorser not being joined as a party.

Chief-Justice Marshall, in the case of Young *v.* Brian *et al.* (6 Wheat., 146), said:

"A suit may be brought in the Circuit Court by the indorsee against the indorser whether a suit could be there brought against the drawer or not. In such a case the indorsee does not claim through assignment. It is a new contract entered into by the indorser and indorsee, upon which the suit is brought; and if the indorsee is a citizen of a different State he may bring an action against the indorser in the Circuit Court."

And in the case of Mollan *v.* Torrance (9 Wheat, 537), Chief-Justice Marshall delivering the opinion of the court, said:

"The case of Young *v.* Brian (6 Wheat., 136), has decided that an indorsee who resides in a different State may sue his *immediate* indorser, residing in the State in which the suit is brought, although that indorser be a resident of the same State with the makers of the note; but in this case the suit is brought against a *remote* indorser, and the plaintiffs in their declaration trace their title through an *intermediate* indorser, without showing that this intermediate indorser could have sustained his action against the defendant in the courts of the United States. The case of Turner *v.* The Bank of North America (4 D., 8), has decided that this count does not give the court jurisdiction."

This court, Ellsworth, C. J., in the case of Turner *v.* Bank of North America (4 Dall., 8), held that the eleventh section of the judiciary act, *supra* (1 U. S. Stats. at

Large, 78), makes it necessary to state on the record the citizenship of the payee of a negotiable note sued on by an indorsee. In that case the suit was brought by the president and directors of the Bank of North America, averred to be citizens of the State of Pennsylvania, against Turner and others, the makers of the note, averred to be citizens of the State of North Carolina, to recover the contents of a promissory note made by the defendant, Turner, payable to the order of Biddle and Co., and which had been indorsed and assigned by them to the plaintiffs. The complaint did not state the citizenship of Biddle and Co., the payees of the note, and this court, Ellsworth, C. J., in delivering the opinion, said:

"A Circuit Court, though an inferior court, in the language of the Constitution, is not so in the language of the common law; nor are its proceedings subject to the scrutiny of those narrow rules which the caution or jealousy of the courts at Westminster long applied to courts of that denomination, but are entitled to as liberal intendments, or presumptions, in favor of their regularity as those of any Supreme Court. A Circuit Court, however, is of limited jurisdiction, and has cognizance, not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of the cases which an unlimited jurisdiction would embrace. And the fair presumption is (not as with regard to a court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without its jurisdiction till the contrary appears. This renders it necessary, inasmuch as the proceedings of no court can be deemed valid further than its jurisdiction appears, or can be presumed, to set forth upon the Record of a Circuit Court the fact or circumstances which give jurisdiction, either expressly or in such manner as to render them certain by legal intendment. Among those circumstances it is necessary, where the defendant appears to be a citizen of one State, to show that the plaintiff is a citizen of some other State, or an alien; *or if, as in the present case, the suit be upon a promissory note by an*

assignee, to show that the original promisee is so; for by a special provision of the statute it is his description, as well as that of the assignee, which effectuates jurisdiction.

"But here the description given of the promisee only is that 'he used trade' at Philadelphia or North Carolina; which, taking either place for that where he used trade, contains no averment that he was a citizen of a State other than that of North Carolina, or an alien; nor anything which, by legal intendment, can amount to such averment. We must, therefore, say that there is error."

Mollan *v.* Torrrance, 9 Wheat, 537;
Turner *v.* Bank of North America, 4 Dall., 8;
Evans *v.* Gee, 11 Pet., 80;
Montalet *v.* Murray, 4 Cranch., 46;
Philips *v.* Preston, 5 How., 278;
Bank of the United States *v.* Moss, 6 How., 31;
Coffee *v.* The Planters' Bank of Tennessee, 13 How., 183;
Morgan's Executor *v.* Gay, 19 Wall., 82.

In the case of Montalet *v.* Murray (4 Cranch., 46), this court held that unless it appeared in the Record that a suit might have been maintained in the Circuit Court between the *original parties* to the note, the court was without jurisdiction.

Chief-Justice Marshall, in the opinion, said:

"If it does not appear upon the Record that the character of the original parties would support the jurisdiction, the object is fatal under the uniform decisions of this court."

In the case of Coffee *v.* The Planters' Bank of Tennessee (13 How., 183), the construction given to the 11th section of the judiciary act (authorities, *supra*), was cited and affirmed by this court. Mr. Justice Daniel, in delivering the opinion of the court, said:

"By the eleventh section of the act of Congress establishing the judicial courts of the United States, it is declared that no district or circuit court of the United

States shall have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made. This provision has been expounded by this court as early as 1799 in the case of Turner *v.* The Bank of North America, 4 D., 8. It has received a further interpretation in the case of Montalet *v.* Murray (4 Cranch., 46); of Young *v.* Brian (6 Wheat., 146); of Mollan *v.* Torrance (9 Wheat., 527); and of Evans *v.* Gee (11 Pet., 80). These several decisions have settled the construction of the eleventh section of the judiciary act, and the principle they have affirmed is unquestionably fatal to a right of recovery under the first twenty-three counts, *for they deny jurisdiction in the courts of the United States over cases of intermediate deduction of title from the payee, where such payee and the maker of the instrument are citizens of the same State,* with the exception of foreign bills of exchange; and in the case before us every special count is framed upon a title thus deduced and is not within the exception made by the statute.

"But whilst the authorities cited have laid down the above doctrine with reference to intermediate allegations of title from the payee of a note or check, they have ruled with equal clearness that as between the immediate indorsee and indorser, being citizens and inhabitants of different States, the jurisdiction of the Federal Court attaches, as upon a distinct contract between these parties, independent of the residence of the original and remote parties to the instrument."

The Planters' Bank of Tennessee, 13 How., 183, decided Dec. term, 1851.

This same doctrine is cited and approved by this court in the case of Morgan's Executor *v.* Gay (19 Wall., 82). Mr. Justice Strong, in delivering the opinion of the court, said:

"In Turner *v.* Bank of North America (4 Dall., 8), it was distinctly ruled that when an action upon a promissory note is brought in a Federal court by an indorser against the maker, not only the parties to the suit, but also the citizenship of the payee and indorser, must be

averred in the Record to be such as to give the court jurisdiction. The same rule was asserted in Montalet *v.* Murray (4 Cranch., 46), in Mollan *v.* Torrance (9 Wheat., 537), and in Gibson *et al. v.* Chew (16 Pet., 315). The judgment must, therefore, be reversed and the cause sent back that amendment may be made in the pleadings showing the citizenship of the indorser of the bills, if it be such as to give the court jurisdiction of the case."

This same doctrine is stated and approved in vigorous terms by this court, opinion by Mr. Justice Harlan, in the case of King Bridge Co. *v.* Otoe County (120 U. S., 226).

This case related to an assignment of a chose in action under the act of March 3, 1875, but the principle is the same.

Mr. Justice Harlan said:

"The act of March 3, 1875, section 1, excludes from the cognizance of a circuit or district court of the United States 'any suit founded on contract in favor of an assignee unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange.' One of the warrants is payable to Z. King and the other to Z. King or order. The latter is not indorsed by him in blank or to the order of the plaintiff. Plainly, therefore, upon any view of the statute, the plaintiff, as the holder or owner of the warrants, could not maintain a suit in the court below, unless King could have sued in that court, had he not sold the warrants. But it does not appear that King could have maintained the suit. *There is no averment as to his citizenship, nor does his citizenship otherwise appear from the Record.* We must, therefore, presume on this writ of error that the Circuit Court was without jurisdiction."

The clause in the act of March 3, 1887, was construed in the case of Nugass *v.* City of New Orleans *et al.*, in the

Circuit Court for the Eastern District of Louisiana, January 2, 1888 (33 Fed. Rep.) Judge Billings delivering the opinion of the court, said:

"The restriction, after excluding from its operation 'foreign bills of exchange,' deals with all other choses in action. Those rights of action which require an assignment were excluded from the jurisdiction unless the assignor could have prosecuted the action to recover thereon before the assignment. Those choses in action which did not require any express assignment, because they were payable to bearer and thus passed by delivery, were also excluded from the jurisdiction unless made by some corporation, if the transferee could not have maintained suit other than before transfer. The construction of the restriction may also be stated thus: The Circuit Court shall have no jurisdiction over suits for the recovery of the contents of promissory notes or other choses in action brought in favor of assignees or transferees except over—*first*, suits upon foreign bills of exchange; *second*, suits that might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made; *third*, suits upon choses in action payable to bearer made by a corporation. It follows that in the first and second cases, since the obligations were of such a nature as to require assignment and the assignor could not have maintained an action in this court before assignment, the plaintiff, the assignee, can not."

But it has been held still further by this court that, although the assignee may maintain a suit against his immediate indorser if he be a citizen of a different State, he can not join in such suit the makers of the note, or a remote indorser, although they may be citizens of a different State from the assignee. This was held in the case of Keary *v.* The Farmers' and Mechanics' Bank of Memphis, 16 Pet., 94. This was the case of a suit brought in the Circuit Court by the assignee against his immediate indorser and the makers of a promissory note, the payee and makers being citizens of one State and the assignee a citizen of another State. It was claimed in

favor of the jurisdiction that a statute of the State of Mississippi, of which State the makers and payee were citizens, authorized a suit jointly against the maker and payee of a promissory note, but this court, opinion by Mr. Justice Story, held, first, that the statute of Mississippi *proprio vigore* is of no force or effect in the courts of the United States; and, secondly, the court, after reciting the clause of the judiciary act of 1789, *supra*, said:

"It is plain upon the language of this clause that as the makers and the payee of the promissory note in this case were all citizens of Mississippi, no suit could have been maintained between them, the original parties, in the Circuit Court. But the same objection does not apply to a suit on the same note by the plaintiffs as indorsees against their *immediate* indorser, La Coste; for there is an immediate privity of contract between them, and they are citizens of different States. This was long since settled by the decision of this court in Young *v.* Brian (6 Wheat., 146). So that it is manifest that as between the makers and the plaintiffs the present suit is not maintainable, and as between the indorser and the plaintiffs as indorsees it is maintainable by the laws of the United States."

And the court, after giving reasons, concludes as follows:

"For these reasons we are of opinion that the present suit, so far as it respects the jurisdiction of the Circuit Court over the *makers* of this note, is ill-founded; and that the plea of the makers to the jurisdiction is good in point of law; and that the suit being a joint action and founded upon *distinct* and *independent contracts*, is incapable of being sustained in the courts of the United States against *any* of the defendants. The consequence is the judgment must be reversed and the cause remanded to the Circuit Court with directions that the plaintiffs take nothing by their writ."

Dromgoole *v.* Farmers' and Merchants' Bank, 2 How., 241.

In the case of Ambler *v.* Eppinger, 137 U. S., 480, this court, opinion by Mr. Justice Field, said:

"The construction given by this court in Deshler *v.* Dodge, 16 How., 622, to the clause in the eleventh section of the judiciary act, which denied to any Circuit or District Court 'cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange,' is in harmony with the construction we give to the act of 1887."

In Metcalf *v.* Watertown, 128 U. S., 586, opinion by Mr. Justice Harlan, this court said:

"Whether the Circuit Court had or had not jurisdiction is a question which we must examine and determine, even if the parties forbear to make it, or consent that the case be considered upon its merits. Mansfield, etc. Railway Co. *v.* Swan, 111 U. S., 379, 382; King Bridge Co. *v.* Otoe County, 120 U. S., 225; Blacklock *v.* Small, 127 U. S., 96, 105; Cameron *v.* Hodges, 127 U. S., 322, 326."

"By the very terms, therefore, of the statute, Metcalf's right to sue in the Circuit Court depends upon the right of his assignors to have brought suit in that court, if no assignment had been made. This view is fatal to the jurisdiction of that court, so far as its jurisdiction depends upon the above provision of the statute, because it nowhere appears in the Record of what State the plaintiff's assignors were citizens when this action was commenced; indeed, it is consistent with the Record that they were, at that time, citizens of the same State with the defendant."

Citing numerous authorities.

And, finally, in Denny *v.* Pironi, 141 U. S., 121, this same doctrine is stated and approved by this court, opin-

ion by Mr. Justice Brown, and where it was still further held as follows:

"This judgment, then, depends for its validity wholly upon the question whether the mere recital of citizenship of the parties in the remittitur is such an incorporation of the same into the Record as obviates the objection to the original petition and supports the judgment. It has been repeatedly held that it was not necessary for the averment to appear in the pleadings, but that the statute was complied with if it appeared in any part of the Record."

But says the court further:

"In the case under consideration, the remittitur formed no proper part of the judgment record and the recital of citizenship formed no proper part of the remittitur."

Judgment was reversed.

In view of the foregoing authorities—this clearly being a suit to recover the contents of a promissory note by the assignees thereof against the *makers*, and the complaint so far from averring that the payee in such note was a citizen of a different State from that of the defendants, avers what in law amounts to an averment that he was a citizen of the *same* State (see opinion, Record, 18 and case Morgan *v.* Gay, 19 Wall., 81 there cited,)—it is clear the complaint does not state facts sufficient to confer jurisdiction, and defendants' demurrer should have been sustained.

OWENS, THE PAYEE IN THE NOTE, CAN NOT BE ELIMINATED FROM THE CASE BY AVERMENT AND PAROL EVIDENCE SHOWING HIM A MAKER OF THE NOTE AND NOT AN INDORSER.

In this connection it is well to attract attention to the provisions of the Oregon Code relating to promissory notes, which, however, are but declaratory of well-settled principles relating to negotiable promissory notes.

The Oregon Code.

Hill's Annotated Laws of Oregon, vol. 2, section 3188, provide as follows:

"All notes in writing made and signed by any person, whereby he shall promise to pay to any other person or his order, or unto the bearer, any sum of money therein mentioned, shall be due and payable as therein expressed, and be negotiable in like manner as inland bills of exchange, according to the custom of merchants."

While section 3190 provides as follows:

"The payees and indorsees of every such note, payable to them or their orders, and the holders of every such note payable to bearer, may maintain actions for the sums of money therein mentioned, in like manner as in cases of inland bills of exchange, and not otherwise."

It is submitted when the note in question was signed, if it ever were signed, by the defendants and delivered to the payee, W. F. Owens, it became a valid instrument upon which suit could have been prosecuted by the payee. When Owens indorsed the same and delivered it to the plaintiffs the *law* stepped in and prescribed definitely the terms of the contract and the obligation of the respective parties.

Will it be contended that a suit could have been "prosecuted" in the Circuit Court to recover the contents of the note in question if no assignment of it had been made to plaintiffs? The plaintiffs are not named in the note, nor are they in any manner referred to therein, and, therefore, had a suit been prosecuted thereon at any time *prior* to the assignment to them, surely *they* could not have prosecuted it. The only person who, prior to such assignment, could have prosecuted a suit to recover the contents of such note was W. F. Owens, the original payee named therein, and as he was a citizen of the same State as that of the defendants,

it follows he could not have prosecuted such suit in the Federal court, although he might have prosecuted a suit thereon in the proper State court, whether successfully or not being a matter not relating to jurisdiction, is quite immaterial and another and entirely different question.

If, as is now claimed, the real character of the transaction was a loan of $10,000 by plaintiffs to W. F. Owens, with defendants as sureties, then, if plaintiffs had wished to preserve their rights as citizens of another State to a forum in a Federal court against the defendants, in the event they might be compelled to bring suit for the recovery thereof, they should have taken as evidence of and as security for such loan such a paper as is not, by specific provision of the United States Statutes, excluded and exempted from that class of instruments of which the Federal court has jurisdiction, namely, a note naming them as payees with the defendants and Owens as makers. On such a writing there could have been no question as to the right of plaintiffs to prosecute a suit for the recovery of the contents thereof in the Circuit Court, but they saw proper to take as evidence of and as security for such loan a certain promissory note by assignment from the payee thereof and, hence, by their own act voluntarily accept a writing for the recovery of the contents of which the Circuit Court has no jurisdiction.

It is submitted the proposition of the complaint is to vary by parol evidence the terms and legal effect of the contract of indorsement, and of the rights and obligations of the parties to the note as fixed by the law.

Authorities.

Parol evidence is not admissible to vary the contract of indorsement, or the agreement of the parties as fixed under the law by the fact of indorsement.

Smith *v.* Caro & Baum, 9 Oreg., 278;
Barnard *v.* Gaslin, 23 Minn., 192;
S. P. Third National Bank *v.* Clark, *Id.*, 263;
Hauer *v.* Patterson, 84 Pa. St., 274;
Parsons on Notes and Bills, Vol. 2, 23;
Same, 519–521;
Armstrong *v.* Scott, 36 Fed. Rep., 63;
Prescott Bank *v.* Cooley, 7 Gray, 217;
Stack *v.* Beach, 74 Ind., 571;
Specht *v.* Howard, 16 Wall., 564;
Brown *v.* Spofford, 95 U. S., 474;
Martin *v.* Cole, 104 U. S., 30;
Barnes *v.* Scott, 117 U. S., 585;
Bullwinkle *v.* Cramer, 3 S. E., 776;
Mason *v.* Bruton, 54 Ill., 354;
Jones *v.* Albee, 70 Ill., 37;
Lee *v.* Pile, 37 Ind., 107;
Martin *v.* Cole., 3 Col., 114;
Deal *v.* Gear, 38 Conn., 16;
Fassin *v.* Hubbard, 55 N. Y., 465;
Howe *v.* Merrill, 5 Cush., 80;
Barry *v.* Morse, 3 N. H., 132;
Stubbs *v.* Goodale, 4 Ga., 106;
Chaddock *v.* Van Ness, 35 N. J., 519;
Bank of U. S. *v.* Dunn, 6 Pet., 51;
Woodward, Baldwin, & Co. *v.* Foster, 18 Grat., 208;
Parsons on Bills and Notes, vol. 2, 521;
Chitty on Bills, 144;
Philips *v.* Preston, 5 How., 291;
Evans *v.* Gee, 11 Peters, 80;
DeWitt *v.* Berry, 134 U. S., 315.

The same rule which excludes parol evidence to vary the terms or obligations of a *written agreement* is applicable to the contract of *indorsement in blank* on a negotiable promissory note where the terms of contract are implied by law.

Bank of U. S. *v.* Dunn, 6 Peters U. S., 51.
Specht *v.* Howard, 16 Wall., 564;
Renner *v.* Bank of Columbia, 9 Wheat., 581;
Martin *v.* Cole, 104 U. S., 30.

While it is true the makers and indorsers of a promissory note are permitted under certain circumstances to show by parol the nature of the arrangement *as between themselves*, to the end that the liability as between themselves may be properly adjusted, either in a suit against some or all of them by the subsequent assignee, it is respectfully submitted that such assignee or last indorsee is not permitted for any purpose to show by parol testimony that the relation that the makers and indorsers of a note hold toward each other or toward him, is other or different from that shown by the writings, and especially must this be so when the *sole* purpose of such oral showing is to make a case cognizable in a Federal court which in the absence of such showing would have no standing in such a court.

This question is succinctly and clearly stated by Parsons on Notes and Bills, vol. 2, sec. 23, in the following words:

"The exact question is this: suppose over an indorsement an agreement is written out in full, setting forth exactly the same promises which the law implies from a blank indorsement; suppose further that in an action by the indorsee upon this indorsement evidence was offered by either party which was inadmissible on the ground that it varied a written agreement; would the same evidence be inadmisssible in the same action if the indorsement were in blank? We are strongly disposed to say

that it would be so as a general rule, and to consider those cases in which such evidence would seem to be admissible as exceptions."

Then this same author proceeds to a consideration of the exceptions, and a careful consideration of these leads to the conclusion that, while in a number of cases, or rather for a number of reasons, the indorser may be permitted to show certain things by parol, as for instance whether the property passed by the indorsement, what was the purpose of the indorsement, whether indorsed to his agent merely to enable him to collect it, and the like, in no case quoted or referred to is the *indorsee* or *assignee* permitted to make any showing by parol in any manner affecting *his* rights under the contract of indorsement in a case in which he seeks to recover on the indorsement against the indorser, or the maker of the note, or either or both.

Parsons, on page 25, same volume, further says:

"An indorser may qualify the contract as it stood before his indorsement by annexing such terms as he will."

In the case at bar the indorser, Owens, so far from in any manner qualifying his contract of indorsement, the plaintiffs, so far from exacting a statement that he was the maker of the note and that the note had been executed for his accommodation, each did just the reverse. The plaintiffs treated him just as the *law* treated him—as an indorser entitled to all the rights of demand and notice, if not of protest. He so treated himself, and in addition to his indorsement in blank, he at the same time, according to the averments in the complaint, subscribed his name to an indorsement written upon the back of said note in the following words:

"For valued received, I hereby waive on the within demand, notice, and protest."

"Since the contract evidenced by a blank indorsement is ascertained by the law, the contract being settled must not be unsettled by parol."

Parsons on Notes and Bills, vol. 2, 520, 521;
Evans *v.* Gee, 11 Peters, 80;
Philips *v.* Preston, 5 How., 278;

"The expression 'Pay to the order of A. B.,' although seeming not to name any immediate payee, is exactly equivalent to 'A. B. or order.'"

Randolph on Commercial Paper, vol. 1, sec. 151;
1st Daniel, 115;
Story on Bills, section 56;
Roby *v.* Phelan, 118 Mass., 541.

The original payee named A. B. can sue upon it without indorsing it. (Authorities *supra*).

Also Huling *v.* Hugg, 1 Watt. Sergt., 418;

But a purchaser from him can only sue *after* indorsement by him. (Authorities *supra*).

The note in question is made payable "to the order of W. F. Owens." (Record, 4.)

It is necessary that the payee of a promissory note should be described with certainty.

Randolph on Commercial Paper, sec. 150;
Byles, 82;
Chitty, 179;
1st Edwards, sec. 140;
Story on Bills, sec. 54;
Evertson *v.* National Bank, 66 N. Y., 14.

In the case under consideration the name of the payee, W. F. Owens, is inserted; no other name is.

It is conceded it would be competent under the Oregon Code for one of two makers of a promissory note in an action on the note to aver and prove by parol that he

signed the note as surety to enable him, for instance, to interpose as a defense in connection therewith that he was discharged by an extension of time given to the principle with knowledge of the suretyship.

Hubbard *v.* Gurney, 64 N. Y., 457.

This is a very different proposition, and widely different in principle from those invoked here, wherein the endorsee and assignee seek to aver in their complaint and prove by parol, *first*, that they are not assignees, but payees; and *second*, that Owens, the payee, is not payee, but maker.

If a promissory note is originally payable to a person or his order, as in the case at bar, then it is properly transferable by indorsement. We say properly transferable, because *in no other way will the transfer convey the legal title to the holder*, so that he can at law hold the parties liable to him *ex directu*, whatever may be his remedy in equity.

Royce *v* Nye, 52 Vt., 74;
Story on Promissory Notes, sec. 120;
Bank *v.* U. S., 20 Vt., 666;
Taylor *v.* Binney, 7 Mass., 479.

The court will observe that the position assumed by the plaintiff in the court below and here, to the effect that Owens was a maker with defendants of the note in question, and that he never was either a payee or indorser of such note in the ordinary acceptation of those terms, is wholly inconsistent with the record made by the parties. In the note set out in the complaint Owens is the payee. The note alleged to have been signed by the defendants is a promise to pay "to the order of W. F. Owens." The complaint avers that "said Owens indorsed said note by writing his name in blank upon the back thereof." But not only so. The complaint further avers,

as we have seen, that he (Owens) alleged in a previous part of the complaint to have been one of the makers of such note, at the same time subscribed his name to the following indorsement written upon the back of such note. "For value received I hereby waive on the within demand, notice, and protest." Is this not an unqualified confession that the plaintiffs regarded Owens as a *payee* and *indorser*, and *not* a *maker* of the note in question? If he were a maker, then why require of him a waiver of demand, notice, and protest? On the face of these writings the law says Owens was a payee and indorser and not a maker, and he being a citizen of the same State of the defendants, as it is conceded he was (opinion, Record, 17) could not have maintained a suit on this note to collect the contents thereof in the Federal court, and the statute of 1887, as corrected by the act of 1888, says that this being so, his indorsee or assignee can not maintain a suit thereon in such court against the makers thereof. Query: Is it competent in the face of this record as to the contract sued upon to permit plaintiff to show by averment in complaint and by parol evidence that Owens was not payee was not indorser, but was one of the makers of the note in question, and this for the *sole* purpose, moreover, of enabling plaintiffs to get into the Circuit Court—a forum which on the written contracts as they stand they were forbidden by law from entering?

The cases which hold that as between the parties who execute or indorse the bill the true relationship may be shown, do not trench in the slightest degree upon the rule that an indorsement can not be varied by parol evidence at the instance of the indorsee. The right of such parties may be tried between themselves, but the right of the holders can not be thereby affected, either at the instance of the indorsee or of the makers or indorsers. The rights of the former can not be enlarged in any

respect by any parol showing, nor can they be diminished, restricted, or in any manner modified by any showing that the makers or indorsers may be permitted to make for the purpose of establishing the rights respectively as between themselves, which it is conceded they may properly do.

Houston *v.* Bruner, 39 Ind., 376;
Stack *v.* Beach, 74 Ind., 574.

This court, in De Witt *v.* Berry, 134 U. S., 315, opinion by Mr. Justice Lamar, said:

"When parties have deliberately put their engagements into writing in such terms as import a legal obligation without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous colloquium between the parties, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected. 1 Greenleaf Ev., sec. 275, and authorities cited; White *v.* National Bank, 102 U. S., 658; Metcalf *v.* Williams, 104 U. S., 93; Martin *v.* Cole, 104 U. S. 30."

Ruling of the Supreme Court of Oregon.

In Smith *v.* Caro and Baum (9 Oreg., 278), Lord, C. J., said:

"The rule that parol evidence is not admissible to contradict or vary a written contract is founded in the highest principles of public policy, *and there is no class of contracts to which it should be more inflexibly applied than to those connected with bills of exchange and promissory notes.*"

In that case it was held in an action by an indorsee against his immediate indorser upon a promissory note indorsed in blank after maturity, that parol evidence of

an agreement between them at the time of the indorsement which would vary the legal liability of the indorser under his indorsement was inadmissible.

The doctrine enunciated in the above ruling is in all respects approved by this court in Martin *v.* Cole, 104 U. S., 30.

In Dale *v.* Gear (38 Conn., 16), the court say:

"The contract of indorsement is implied by law as clearly and perfectly from the blank indorsement of a negotiable note, irrespective of any contingency of negotiation, as if written out in full when indorsed. And if as between the original parties there is any equity existing *de hors* the instrument, which should prevent the indorser from enforcing his contract, it must be set up as an equity provable in equity and bar an apparent legal liability."

The court in the above case, proceeding further, opinion by Judge Joynes, says:

"When the legal import of a contract is clear and definite, the intention of the parties is for all substantial purposes as distinctly and as fully expressed as if they had written out in words what the law implies. It is immaterial how much or how little is expressed in words, if the law attaches to what is expressed clear and definite import. *Though the writing consist only of a signature, as in the case of an indorsement in blank, yet where the law attaches to it a clear, unequivocal, and definite import, the contract imported by it can no more be varied or contradicted by evidence of a contemporaneous parol agreement than if the whole contract had been written out in words.* The mischief of admitting parol evidence would be the same in such cases as if the terms implied by law had been expressed."

The above is quoted and approved by the Supreme Court of Oregon in the case of Smith *v.* Caro and Baum, *supra.*

In Rodney *v.* Wilson (67 Mo., 124), which was the case of a blank indorsement, the court said:

"It is the generally received opinion that the legal import of every written undertaking is a part of the contract. Now being the payee of the note, *Rodney could not, by simply writing his name on the back thereof, contract in any other capacity than that of indorser.* As indorser the law fixed his liability."

So in the case at bar, Owens being the payee named in the note *could not by simply writing his name on the back thereof contract in any other capacity than that of indorser.* As indorser the *law* fixed his liability and also defined his rights. The liability was that he would pay the note in case the makers thereof failed to pay after demand and notice. His rights as defined by the contract were that there should be demand and notice before he should be called upon to pay, unless indeed he saw proper, as he did in this instance, to waive such right. But the fact that he waived the right does not change the nature of his contract of indorsement. In other words, it is not permitted to the plaintiffs to declare him a *maker* of the note in the face of this *express contract of indorsement.* Suppose, for instance, Owens had failed to give an express waiver of demand and notice, would the plaintiffs in such case be permitted in their complaint to change the character of his contract by setting up facts from which it is claimed he was one of the original makers of the note? It would seem clearly not, and, if not in that case, then clearly the fact that he waived his right to demand and notice does not confer the right.

In the case of the Bank of Albion *v.* Smith (27 Barb., 491), it was held that in an action against an indorser on a blank indorsement the plaintiff will not be allowed to prove that at the time the defendant sold and indorsed the note to him it was agreed by parol that the plain-

tiff need not make any demand of the maker when the note should mature, but the defendant would be bound to pay without such demand, and the court said:

"The undertaking of an indorser may be either limited or enlarged at the time it is entered into by express terms at the pleasure of the indorser, but if no such terms are expressed in the indorsement, the law fixes the character of the undertaking and it can not be varied by parol. If an indorsement can be varied by a contemporaneous parol agreement, then its entire character may be changed and no one ever know how or to what extent an indorser in blank is bound."

Bank of Albion *v.* Smith, 27 Barb., 491.

In the case of Stack *v.* Beach (74 Ind, 571), after stating the general rule that the indorsement of a promissory note, or bill of exchange, regularly following that of the payee constitutes a certain and defined contract with a legal force and meaning as complete and certain as if all the conditions and stipulations of the contract had been written out at full length, and that parol evidence is inadmissible to modify or contradict such a contract of indorsement, the court proceeds to state the exceptions to such rule as to the admission of parol evidence in these words:

"Yet, such evidence is admissible to show that the indorsement was for the purpose of creating a trust; that it was for collection merely; that the instrument was indorsed for collateral security, or delivered as an escrow, or indorsed to an agent for a particular purpose."

These are given as exceptions, and it will be perceived that the rights under these exceptions do not attach to the holder of the note, but to the indorser or indorsers, those sought to be held on the note, and only for certain special purposes.

Stack *v.* Beach, 74 Ind., 571.

The case of Specht *v.* Howard, decided in this court December, 1872 (16 Wall., 565), was the case of a suit by the indorsee of a negotiable note which had no place of payment specified in it, against the indorser who relied on a confessedly defective demand on the maker of payment, that is to say, on a fruitless effort to demand in the place where the note was dated, but in which place the maker did not live. On the trial of the cause in the court below, the court permitted parol evidence to be introduced tending to prove that at the time when the note was drawn it was agreed between the maker and the indorsee that it should be made payable in the place where the effort to demand payment had been made, and that this place of demand had been omitted by the mistake of the draughtsman. Subsequently, however, in presenting the case to the jury, the court withdrew this evidence on the ground that the judge became convinced that it had been improperly let in. It was assigned for error in this court that the court below had improperly withdrawn this evidence from the jury. This court, Mr. Justice Swayne, after stating the case, said:

"The evidence was *improperly* admitted and was *properly* withdrawn. The agreement was a nullity and could not in any wise affect the rights of either of the parties. It is a firmly settled principle that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making or indorsing of a bill or note, can not be permitted to vary, qualify, or contradict, to add to or subtract from the absolute terms of the written contract. An agreement between the creditor and principal must, to exonerate the surety, be one binding in law upon the parties."

Citing McLemore *v.* Powell, 12 Wheat., 554;
Parsons on Notes and Bills, 501.

This court, in Brown *v.* Spofford (95 U. S., 474), held that where at the time of making and indorsing a prom-

issory note, a written contract in relation thereto was entered into by the parties, parol testimony varying or contradicting its terms is not admissible.

In the case of Evans *v.* Gee, (11 Pet., 80), the court said:

"If the evidence was intended to resist a recovery upon the merits on account of the interest which another copartner or another person had in the consideration for which the bill was indorsed, we observe, the plaintiff being the *bona fide* holder of it, such a fact could not be inquired into in an action on the bill, as it would import a different bargain and agreement from the tenor of the bill and indorsement when the bill was given or transferred."

The Proposition of Plaintiff is to vary the Terms of the Contract of Endorsement.

But it is said that the averments in the complaint and the proof offered do not contradict or tend to contradict the terms of the original contract. But let us see how this is. Under the contract as it stands on the written papers, what are the respective relations of the several parties to it? Clearly this: The defendants are the makers of a negotiable promissory note. W. F. Owens, a citizen of the same State of the defendants, is the original payee named in that note; he is also the indorser of the same to the plaintiffs, citizens of another State; while the plaintiffs are assignees and holders of the note in question. The law steps in and extends certain rights and imposes certain obligations upon each of these three parties respectively, namely, the defendants, the original payee and indorser, and the assignee. We have considered what these rights and obligations are. Now, then, the plaintiffs come in and seek by averment *aliunde* the record, made by the parties themselves *in writing*, to change all this by making the defendants *and* Owens

the *original makers* of the note in question. This, it is respectfully submitted, is a proposition to change the terms and obligation of the contract, especially in so far as it affects Owens, while another effect is to deprive the makers of the note of a hearing in their own State court.

But, again, there is no averment in the complaint whatever to the effect that when the defendants signed the note as makers thereof—conceding for the moment they ever did sign it—that they had done so with any understanding or knowledge that it was to be turned over to plaintiffs, or that it should be used in any manner except as under the law it might be used as a negotiable promissory note launched upon the commercial world by its makers. Here the law undoubtedly authorized the payee, Owens, to negotiate it and assign it to any one, either a citizen of the State or otherwise; but he was *only* authorized to do it as *payee* of a promissory note—namely, by *indorsement* and *delivery*. He had no right to do it in any other manner, and thus jeopardize defendants' right to have any suit that might be brought to recover the contents thereof brought in the State court.

In the case of Barnes *v.* Scott (117 U. S., 585), which was a suit on a promissory note wherein the defendant offered evidence to show "that the note sued on when given was not intended by him, the maker, nor by Winston, the payee, as a promissory note, but was only intended and so given by him and received by Winston as a memorandum of the then estimate of the value of the estimated interest of Winston in the Atchison bonds then delivered as part of the profits of a certain contract for the construction of the Atchison branch, to be accounted for on a settlement between the parties to such contract," this court, opinion by Mr. Justice Woods, held—

"so far as the evidence excluded was offered in support of the second plea, it is plain that it was inadmissible. Its purpose was to vary or contradict by an alleged contemporaneous verbal agreement the contract which the parties had reduced to writing. It was offered to show that a promissory note in the usual form was not intended by the parties to be a promissory note, but was a mere memorandum by which the maker promised nothing; which gave no rights to the payee, and *was to all intents and purposes vain, futile, and of no force or effect whatever.* It is not necessary to cite authority to show that the evidence was inadmissible for such a purpose."

This is precisely what the plaintiffs in this case propose doing in the case at bar. Although the paper is on its face a promissory note in due form, Owens being the payee and subsequent indorser, the plaintiffs, the assignee, propose to show by parol proof that this note when executed by the defendants and as alleged delivered to Owens, the payee, gave no rights to the payee, and was to all intents and purposes "*vain, futile, and of no force or effect whatever.*"

Authorities Cited by the Court Below Reviewed.

We beg to attract attention to the authorities cited by the learned district judge who tried this cause in the court below in support of the theory of the plaintiff.

The first case cited by the learned judge is Brummel & Co. *v.* Enders *et al.*, 18 Grat., 905.

But the question as to whether the indorsee or assignee of a negotiable promissory note could be permitted to show by parol a different contract than that which the law attaches to the regular indorsement of such a note by the payee named therein did not arise in that case.

The question in that case was simply whether a negotiable note made by A, the name of the payee being blank, and placed by A, the maker, in the hands of an agent to be sold for his benefit, and such agent sold the same at a

greater discount than the legal rate of interest, the purchaser not being informed that it was sold for the benefit of A, and the names of the purchasers were inserted in the blanks as payees either by such agent at the time of the sale, or by the purchaser himself afterwards, was or was not usury. This was the *sole* question in that case. The court held it was not usury on the authority of a former decision in that court. But the court in its opinion in this very case, in combatting the contention of counsel as to the invalidity of a note where the payee is blank, cited the case of Ives *v.* Farmers' Bank, 2 Allen, 236, and commenting, said:

"The same doctrine has often been affirmed in this country" (referring to the doctrine laid down in the case of Crutchly *v.* Mann, 5 Taunt. R., 529; 1 Eng. Cl. R., 179.)

"In Ives *v.* Farmers' Bank, 2 Allen R., 236, the defendant signed a printed form of a note, and which when signed, read as follows:

"$1,585.90. BROOKLYN, *Sept. 20, 1858.*

after date promise to pay to the order of December 23, dollars at value received.

"GEORGE R. IVES."

"The paper in this form was delivered to one Yale, and the defendant alleged that it was delivered to him only as a memorandum, and not to be used as a note. But Yale filled it up so as to make it a note for the sum of $1, 585.90, payable to the order of himself, 3 months after date, at the Atlantic Bank, New York, and indorsed it to the plaintiff, who discounted it for his benefit. The court held, upon the authorities of the cases just cited, that the paper assigned by Ives was a promissory note importing a complete and valid contract, and that evidence was not admissible to show that it was intended to be only a memorandum, as that would be to vary by parol the meaning of a written instrument."

This authority, therefore, it is respectfully submitted, so far from sustaining the theory of the plaintiff in this case, is directly against it.

The next case cited by Judge Deady is that of Harris *v.* Brooks, 21 Pick., 195.

The question involved in that case was simply this: Whether certain conduct upon the part of the holder of a note after maturity, by which one of the makers of the note, who was an accommodation surety for his co-maker, was misled and prevented from obtaining security which he at the time might have done but for the action of the holder, could be shown in defense in an action on the note as releasing the person so misled.

The third case cited is given in the opinion (Record, 18) as Smith *v.* Morrell, 58 Me., 48. No such case is reported in any part of 58 Maine. The case referred to is evidently Smith *v.* Morrill, 54 Me., which rested mainly for its conclusion on the opinion of Mr. Justice Washington, 4 Wash. C. C., 480, hereinafter cited, and of course falls with the opinion of Mr. Justice Washington in view of the numerous cases since decided by this court, notably that of Martin *v.* Cole, *supra* (and more fully considered herein later on), decided at the October term, 1881.

The next case cited by the court below is that of Susquehanna Bridge and Bank Co. *v.* Evans, 4 Wash. C. C., 480. This case, opinion by Mr. Justice Washington, does go to the extent of holding, as stated in the opinion, "that the reasons which forbid the admission of parol evidence to alter or explain written agreements and other instruments, do not apply to those contracts implied by operation of law, such as that which the law implies in respect to the indorser of a note of hand." But this cause was decided in the third circuit, then composed of the two districts—Pennsylvania and New Jersey—over sixty-eight years ago—in 1824—and, as has been already shown in this brief, the doctrine there announced has not since then been recognized to the extent as therein stated, so far as I have been able to examine, by any court. Upon the contrary, it has been expressly and without qualification

overruled by this court; first, in the case of Bank of the United States *v.* Dunn, 6 Pet., 51, and again at the October term, 1881, in the case of Martin *v.* Cole, 104 U. S., 30.

Mr. Justice Matthews, in delivering the opinion of the court in the latter case, after citing the quotation *supra* from Mr. Justice Washington, 4 Wash. C. C., 480, said:

"The rule is tersely stated in Benjamin's Chalmers' Digest of the Law of Bills of Exchange, art. 56, p. 63. '*The contracts on a bill as interpreted by the law merchant are contracts in writing. Extrinsic evidence is not admissible to contradict or vary their effect*'—citing Abrey *v.* Crux, 5 Law Rep. C. P., 37."

Mr. Justice Matthews, proceeding further in the opinion in this case, says:

"The rule declared by Mr. Justice Washington in the case cited (4 Washington C. Cl., *supra*) was expressly rejected by this court in Bank of the United States *v.* Dunn, 6 Pet., 51., one distinct ground of its opinion being that parol evidence is not admissible to vary a written agreement; citing the language of the court in Renner *v.* Bank of Columbia, 9 Wheat., 581–587, for there is no rule of law better settled or more salutary in its application to contracts than that which precludes the admission of parol evidence to contradict or substantially vary the *legal import* of a written agreement."

Martin *v.* Cole, 104 U. S., 30;
Renner *v.* Bank of Columbia, 9 Wheat., 581–587;
Specht *v.* Howard, 16 Wall., 564;
Forsyth *v.* Kimball, 91 U. S., 291;
Brown *v.* Spofford, 95 U. S., 474;
Cox *v.* National Bank, 100 U. S., 704;
Brent's Executors *v.* Bank of the Metropolis, 1 Peters, 89;
See cases collected in Bigelow on Bills and Notes, 168;
Byles on Bills, 6th Am. edition, Sharswood's note, 157;
Second Wharton's Evidence, sec. 1058 *et seq.*;
Benjamin's Chalmers' Digest of the Law of Bills of Exchange, art. 56, p. 63.

The case of Hubbard *v.* Gurney, 64 N. Y., 457, being the next case quoted by Judge Deady, is much the same in principle as the case just cited—the question being as to whether it was competent under the New York Code for one of two makers of a promissory note, in an action upon the note, to prove by parol that he signed the note as surety to enable him to interpose as a defense that he was discharged by an extension of time to the principal and with knowledge of the suretyship. This is clearly one of the exceptions to the general rule (already referred to in this brief) recognized by courts, and is very different in principle from the question involved in the case at bar, wherein the plaintiff proposes to show by parol that the relations of the makers, payee, and indorser were not only different as between themselves from that shown in the writings, but that the relations of all to plaintiffs were entirely different from that shown by the instrument. The evidence held to be admissible in the case of Hubbard *v.* Gurney clearly did not alter or vary the written contract, as the fact proved simply operates when the knowledge of it is brought to the creditor to prevent him from changing the contract or making a different one with the principal debtor without the consent of the surety, or from impairing the rights of the latter by releasing the security or omitting to enforce the contract when requested.

The only remaining case cited by the court below, with the exception of sec. 723, Daniel on Neg. Insts., vol. 1, and 2 Wharton's Evid., sec. 1059, which do not seem to throw much light on the subject, and which so far as they do support plaintiffs' theory are discredited by this court in Martin *v.* Cole, 104 U. S., is the case of Sweet *v.* McAllister, 4 Allen, 353.

This was not an action on a note by any of the parties to it, but was a suit brought by a person who had been

indorser on a note, and who had paid it, against the makers of the note, one of whom signed as surety, to recover the money he had paid as such indorser, and the court held that the party who signed as surety could in this case show the relation between himself and the plaintiff on the note was in reality that of co-sureties. The note, it will be borne in mind, had been paid and cancelled, the suit being for money paid by the indorser.

Again, Mr. Justice Matthews, in the case of Martin *v.* Cole, *supra*, refers to section 718, Daniels' Negotiable Instruments, and section 1059, Wharton's Evidence, cited by Judge Deady, and disapproves of the doctrine therein enunciated.

In view of the foregoing it is apparent not one of the authorities cited by the court below in support of the plaintiff's theory can have any weight.

But conceding for the argument that the assignee of a promissory note is at liberty *ordinarily* to aver and prove in a suit on such note all that the plaintiff claims the right to aver and prove in this case, it is confidently submitted that even then this court has no jurisdiction, because after all, and admitting further, for the argument, the transaction to have been precisely, as it is claimed in this complaint it was, it is all irrelevant, for still this is, after all, a suit to recover the contents of a promissory note which the plaintiffs acquired by assignment, and *only* in that way their title to the paper sued on comes to them, *not directly* from the *defendants*, but by *assignment from the payee* named therein, and whether such assignor or these plaintiffs could not have prosecuted a suit on the same prior to such assignment, either because of the identity of citizenship of the defendants and the assignor, or for the reason that the paper never had any vitality until indorsed to plaintiffs—in either event, it is submitted, the fact

remains that it is a suit to recover the contents of a promissory note by an *assignee* against the *makers* thereof, on which no suit could have been prosecuted in a Circuit Court of the United States by the assignor, or any one else, and hence, in any possible view of the case, it comes under the ban of the statute.

"But," says the court in its opinion (Record, 18), "although an indorser in form, the law regards him as a maker, and therefore the holder of the instrument was not bound to give Owens notice of the non-payment thereof by the defendants, even if he had not expressly waived the same."

Conceding this to be so, it is confidently submitted it can not change the doctrine for which we contend, or in anywise affect it. On the face of the writings as they stand—the note and its endorsements—Owens was clearly entitled to demand and notice, and it is only by permitting a change by parol in the character of the transaction, and the legal relation of parties, from that shown by the note and its indorsements, and by which the *payee* or *indorser* is transformed into a *maker*, and the *makers*, the defendants, into his *accommodation indorsers*, that it can be said Owens was not entitled to demand and notice. But by doing this too much is proven for the plaintiffs' case, which converts Owens, the payee, into a maker of the note, and the defendants herein as sureties and indorsers for his accommodation, and in such event the defendants were entitled to demand and notice as such accommodation indorsers.

ERRORS IN THE ADMISSION OF EVIDENCE.

Point II.

ASSIGNMENT THIRD.

This assignment is to the effect that the court erred in permitting the witness, Hyman Abraham, to testify as to

what was written him by W. F. Owens, as to what he, the witness, wrote Owens, and as to what was said by and between him and B. Goldsmith in the absence of and without the knowledge or hearing of the defendants or any of them, and in not sustaining the objection of defendants' counsel to all such testimony.

This testimony and the whole of it was incompetent and immaterial and improperly admitted, as is respectfully submitted, for several reasons:

1st. Because it related to an immaterial issue and tended to prove a different character of contract between the parties than that shown by the note and indorsements;

2d. Because it in the main was evidence relating to the alleged contents of letters passing between the witness, Abraham, and the man, Owens, neither of whom is a party to this suit, and without any attempt to account for the loss or absence of the letters, it was *secondary* evidence and improperly admitted; and

3d. Because the alleged conversations between the witness and B. Goldsmith, and the correspondence between him and Owens were without the knowledge or hearing of the defendants or any of them sought to be affected by them.

Martin *v.* Cole, 104 U. S., 30;
Smith *v.* Caro, 9 Oregon, 278.
Also see other authorities hereinbefore cited.

The Oregon statute defines the rule as to the admission of declarations in evidence. Hill's Annotated Laws of Oregon, vol. 1, page 552, sub-division 3, says:

"A declaration or act of another, *in the presence* and *within the observation* of a party, and his conduct in relation thereto."

Again sec. 684, Oregon Code, *supra*, says:

"The rights of a party can not be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them."

POINT III.

ASSIGNMENT FOURTH.

The fourth assignment is to the effect that the court erred in permitting the witness, Hyman Abraham, to testify as to what W. F. Owens wanted with the money, which it is alleged he borrowed on the note sued on, and in not sustaining the objection of defendants' counsel to the following question propounded to him: "What, if you know, did witness want this money for?" (Record, 37).

This question and its answer were wholly immaterial as well as incompetent. The issue in the case was as to whether the signatures of the defendants were genuine or forgeries. The question as to what Owens wanted with the money was wholly immaterial and could have no legitimate bearing whatever on that issue or any other involved, but could only tend to confuse and befog the jury to the prejudice of the substantial rights of the defendants. But not only so. The answer of witness shows this to be so. He answered as follows: "As near as I can remember Owens *said* he wanted the money to pay on wool in his business." (Record, 37). Even were Owens a defendant in the case or a party to the suit in any sense, his declarations in the absence of his co-defendants would be incompetent to effect them. *Afortiori* may it be urged that such declarations when he is not a party to the suit were clearly inadmissible.

(Authorities *supra*.)

POINT IV.

ASSIGNMENT FIFTH.

What has just been said is in a measure, although not so forcibly, applicable to this assignment of error, which relates to the question asked the witness, Abraham, as to what, if he knew, were the relations between the defendants and W. F. Owens and the answer thereto.

POINT V.

ASSIGNMENTS SIXTH, TENTH AND ELEVENTH.

This brings us to a consideration of the sixth, tenth, and eleventh assignments of error which will be considered together, and are as follows:

SIXTH.

The court erred in not sustaining the defendants' objection to the introduction in evidence of the book purporting to be a lot of certificates of stock in the Grange Business Association, and in admitting such book in evidence, and in admitting the evidence of the witness George W. Jones in reference thereto, and to his signature thereon, and in permitting such book to be used by the witness and jury for comparison purposes.

TENTH.

The court erred in permitting the witness, Edward Failing, to testify that the signature of George W. Jones "is as susceptible of imitation as that of either of the names to the note," in answer to the question (after being shown the book of certificates referred to and admitted in evidence and being requested to look at the name George W. Jones upon the stubs written thereon) as to whether or not in his opinion "that would be an easier

name to counterfeit than that of M. B. Holmes, or otherwise," and in not sustaining defendants' objection to such question and answer.

ELEVENTH.

The court erred in not sustaining the objection of defendants' counsel to the following question propounded to the witness, Edward Failing: "Look at the name George W. Jones upon the stubs written upon this exhibit (witness having been shown the book of certificates admitted in evidence and containing a number of the signatures of George W. Jones) and state whether or not in your opinion that would be an easier name to counterfeit than that of M. B. Holmes, or otherwise," and in permitting the witness to answer said question.

These three assignments of error are based on the following portions of the bill of exceptions (Record, 37, 38, 39):

"Plaintiffs called Geo. W. Jones, as a witness, and witness was shown a book that purports to be a lot of certificates of stock in the Grange Business Association and asked to state if the signatures of Geo. W. Jones affixed to the stubs of these certificates were his genuine signatures. Answer: 'Yes; I wrote them.'

"Plaintiffs' counsel then stated to the court: We will tender this and will state as to what we think it proves. We think it is a circumstance to go to the jury, from which they may draw the conclusion of such weight as they may see fit, that Owens, having the promise of money on the signature of Mr. Jones, and having in his possession signatures of Jones which were genuine, so that they might have been counterfeited, *would have been apt to have counterfeited his signature if he was in that business and would not have gone off to hunt up the signature of Holmes*, and also that we may ask our expert if the name of M. B. Holmes *is easier to counterfeit than the name of Geo. W. Jones, and we tender this in evidence for that purpose.*"

"It had been stipulated between counsel for plaintiffs and defendants that said book was found among the papers of W. F. Owens, after his decease, by the administrator of his estate, and the witness, Jones, had testified concerning the Grange Business Association that it was originally a joint-stock company, formed for the purpose of disposing of farmers' products, chiefly grain and wool, in which interests were held by a great many persons in Douglas County, among others himself; that he was secretary of the organization, and as such had charge of this book; that he disposed of his interest in the concern in the year 1878 and turned the book over to W. F. Owens. This witness also testified that after the original organization of said Grange Business Association had been in existence for a few years a great number of those originally interested in its objects disposed of their interests and retired; that the business was thereafter conducted, so far as he was advised, by W. F. Owens, and he could not say whether other persons continued with him in interest or not.

"Defendants, by their counsel, objected that it is immaterial and irrelevant. The court overruled the objection and defendants excepted, and the exception was allowed by the court, and this book was admitted in evidence." (Record, 37, 38.)

* * * * * * *

"Edward Failing was called as a witness by plaintiffs and, upon sufficient foundation laid, admitted by the court as an expert in handwriting. The plaintiffs' counsel, during the examination of this witness, showed witness the book of certificates heretofore admitted in evidence and containing a number of the signatures of Geo. W. Jones, and asked witness to look at the name Geo. W. Jones upon the stubs written upon this exhibit and *state whether or not, in your opinion, that would be an easier name to counterfeit than that of M. B. Holmes, or otherwise.* Defendants, by their counsel, objected to the evidence as immaterial and incompetent. The objection was overruled by the court, and defendants excepted, and the exception was allowed by the court, and witness answered *that the signature of Geo. W. Jones is as susceptible of imitation as that of either of the names to the note.*" (Record, 39.)

It will be observed that this book of certificates did not contain nor purport to contain any signature of W. F. Owens, or of any of the defendants herein, nor was this book proper evidence for any purpose whatever in the case. The only claim was that it contained the genuine signature of a *third party,* that of the witness, George W. Jones, and the *only* purpose for which plaintiffs' counsel claimed that it was proper evidence was that it would prove or tend to prove "that Owens, having the promise of money on the signature of Jones (as it was claimed from the testimony of Hyman Abraham, Record, 36) and having in his possession the genuine signatures of Jones so that they *might* have been counterfeited, *would have been apt to have counterfeited his signature if he was in that business, and would not have gone off to hunt up the signature of Holmes;*" and for the further purpose, to use counsel's language, "that we may ask our expert *if the name of M. B. Holmes is easier to counterfeit than the name of George W. Jones, and we tender this in evidence for this purpose.*"

It seems to the writer of this brief almost incredible that the learned District Judge who tried this cause in the court below could, in view of such a proposition from counsel as to the *sole* purpose of this testimony, and of the well-settled rules of evidence on the subject of handwriting, admit this book in evidence for the purpose stated, against the objection of opposing counsel; and still greater becomes the wonder when this book was by the court permitted to be used, not only by the jury but the witness, for the purpose it was in connection with the testimony of the expert witness, Edward Failing.

It must be borne in mind there is no issue in this case—made in so far as appears from the Record—either by the pleadings or the evidence, to the effect that the names of the defendants to the note in question were forged by the

payee of the note, W. F. Owens. True it does appear from the Record that the defendants claim they never signed their names to the note and that their signatures thereto are forgeries, but no issue was tendered by any averment, or by any evidence offered by defendants that Owens was the forger. For aught that appears in the Record the defendants may never have suspected Owens as being the man who committed the forgery; for aught that appears in such Record they may have suspected the plaintiffs or the plaintiffs' agent or some *third* person; clearly, therefore, for this and other reasons it was not competent for plaintiffs to go into evidence as to the signature of Jones or a comparison of the signatures of Jones and Holmes. Under no rule relating to evidence of handwriting was this book or the testimony of the expert Failing in reference thereto admissible.

This expert, Failing, in the face of the fact that the signatures in question were not ancient, but of very recent date, less than three years old (the note is dated August 9, 1886; the trial occurred June 18, 1889), and of the further fact apparent on the Record, that any number of living witnesses acquainted with the handwriting of defendants might have been called to the stand, is called as an expert witness to convince the jury that the signature of these defendants to the note in question were genuine, by testifying, *not* that an admittedly genuine signature of one or more of the defendants was, in his opinion as an expert, in all respects like the signature of such defendant to the note in question, and that the two were written by the same person, but rather that, in his opinion, the name of one, George W. Jones, a *witness, a stranger to the Record, a third person,* having no connection with the case, as shown to him on the stubs of this book of certificates, would be "*an easier name to counterfeit than that of M. B. Holmes, one of the defendants,*" and that, in his opinion as an expert, the *alleged* signature

of George W. Jones, as it appeared to him on the stubs of the certificates in said book, because he never saw Jones write his name in his life, so far as appears from this Record, "*is as susceptible of imitation as that of either of the names to the note.*"

It is respectfully submitted, the introduction of this book as evidence for the purpose stated, and of the evidence of this expert and his use as a witness of the book in question, can not be recognized as competent under any rule, or any exception to any rule, relating to the proof of handwriting ever prescribed by any statute or announced by any court, or by any law writer on the subject.

Conceding for the moment that under either the Oregon statute relating to evidence of handwriting, or any other statute or rule of decision, it is competent to permit an expert witness to use comparison papers—whether competent evidence in the cause for any other purpose or not—and whether the signature in question is ancient or otherwise—in testifying as to the disputed signature, still, the introduction of this book of certificates—and its use as a comparison paper by the expert Failing in the manner and for the purpose stated—were *improper* and *incompetent*, and it is quite apparent tended strongly to prejudice the substantial rights of the defendants.

POINT VI.

ASSIGNMENT SEVENTH.

This assignment is as follows:

The court erred in permitting the witnesses, J. S. Fitzhugh, B. Brockway, V. S. Arrington, S. Caro, D. S. K. Buick, and E. G. Hirsh, or any of them to testify as to whether they would act upon the signatures of the defendants attached to the notes sued on if they came to them in an ordinary business transaction.

This assignment is based on that portion of the bill of exceptions which reads as follows:

"J. S. Fitzhugh was called as a witness by plaintiffs and asked: 'Are you acquainted with the handwriting of the defendants?' Witness answered: 'I know the handwriting of R. Phipps; have seen him write. I have seen the signature of M. B. Holmes upon which he acted.' Witness was shown the note in dispute and asked: 'Are the signatures of R. Phipps and M. B. Holmes on this note, in your opinion, the genuine signatures of those parties?' Witness answered that in his opinion they were their genuine signatures.

"Witness was then asked: 'Would you act upon those signatures if they came to you undisputed in an ordinary business transaction?' Defendants, by their counsel, objected that it was immaterial and irrelevant. The court overruled the objection, and defendants then and there excepted, and the exception was allowed by the court, and witness answered that he would act upon those signatures.

"The same question (to wit: 'Would you act upon those signatures if they came to you undisputed in an ordinary business transaction?')—objection, ruling, exception, allowance, and answer were asked, made, allowed, and received of, in regard to and from each of the witnesses for plaintiffs, to wit: B. Brockway, V. S. Arrington, S. Caro, D. S. K. Buick, and E. G. Hursh, by the testimony of *some* of whom the signatures of each of the defendants had been identified." (Record, 38.)

This testimony was clearly incompetent and wholly irrelevant and tended to affect adversely the material and substantial rights of the defendants. The witness Fitzhugh had testified very properly that he was acquainted with the handwriting of the defendant Phipps—had seen him write. He was also permitted to testify without objection that he "had seen the signature of M. B. Holmes, *upon which he acted.*" Whereupon, being shown the note in dispute, he was asked the following question: "Are the signatures of R. Phipps and M. B. Holmes on this

note in your opinion the genuine signatures of those parties?" This question, although it was not shown that the witness was an expert, and although clearly as to his knowledge of the signature of the defendant Holmes, his testimony was insufficient to justify it, the witness was permitted to answer without objection, and to this no objection is urged here, and he did answer as follows—I quote from the bill of exceptions—(Record, 38): "That in his opinion they were their own genuine signatures." Already he, the witness, had been permitted to go unrestrained by counsel beyond the boundary of legitimate statement, when this further question was propounded to him by plaintiff's counsel (Record, 38): "Would you act upon those signatures if they came to you undisputed in an ordinary business transaction?" To this defendants' counsel very properly interposed an objection, that the question was irrelevant and incompetent, which was overruled by the court, and the witness answered that "he would act upon these signatures," and an exception was noted and allowed.

It is submitted this was not a proper question. He had already testified he believed the signatures of these two defendants to be genuine. This evidence called for by this question was merely cumulative—but if properly invoked might perhaps not be assignable for error—but it is submitted, the question invoked a rule not recognized as a proper one on the subject of direct evidence as to handwriting. It was not proper as a test of the knowledge of the witness as to the handwriting of these two defendants, because that was a question for the court; one had already been passed on by the court, and when the witness had answered as to his belief that the signatures were genuine, that was the extent to which he could be properly examined except on cross-examination.

But this same question "Would you act upon those signatures if they came to you undisputed in an ordi-

nary business transaction" (Record, 38), was propounded to the witnesses Brockway, Arrington, Caro, Buick, and Hursh, with the same objection, ruling, exception, allowance, and answer, as in the case of the witness Fitzhugh (Record, 38).

The court will perceive from the bill of exceptions (Record, 38) that in so far as appears from such Record, no foundation whatever, such as is recognized by any rule of evidence, was laid to justify the introduction of this evidence or to support any opinion whatever from any of the witnesses named as to the handwriting of the defendants or any of them.

It does not appear that any of these witnesses were experts. It does not appear that any one of them had ever seen the defendants or any one of them write their names. It fails to appear that any one of them ever saw a signature which was admitted or proven to be the signature of any of the defendants, much less all of them. From aught that is shown by this Record, none of these witnesses had any personal acquaintance with or knowledge of these defendants or any of them. Upon the contrary, all that is shown in this Record from beginning to end as a basis for the testimony of these five witnesses as to the handwriting of the defendants and as to the signatures to the note in question is the single statement in the bill of exceptions (Record, 38) that "by the testimony *of some* of whom (the five witnesses named) the signatures of each of the defendants had been identified."

Precisely what this phrase "had been identified" in this connection means may be something of a query. What signatures were identified? The signatures to the notes in question or some other signatures of the defendants? Did they identify the signatures of defendants to the note in question as their genuine signatures or as forgeries? Most probably the former meaning is in-

tended to be conveyed. And *how* did they identify them? By a personal knowledge of their handwriting? By having seen them write, or by a comparison of signatures; and if so, with what document or documents did they compare them or in what manner were they identified by them?

One thing, however, is quite clear and that is that it was only by a *part* of these five witnesses—which ones or how many, whether two or three or four is a question in reference to which we are uninformed—that the signatures of the defendants had been identified, while it is equally clear, made perfectly plain by the bill of exceptions, that as to the balance, whether one or more but at least *one*, no testimony whatever as to the identification of defendants' signatures had been offered; and yet each and all of the five witnesses were permitted to testify respectively that he would act upon the signatures of *each of the defendants* to the note in question, if they came to him undisputed in an ordinary business transaction—meaning, as we must presume, and as the jury doubtless were given to understand, that they would *act favorably*, or in other words, accept them as genuine signatures respectively of the three defendants.

Did it not appear differently *affirmatively* from the bill of exceptions, then perhaps this court might properly say it was for the court below to determine whether the proper ground had been laid as to the knowledge respectively of these five witnesses of the handwriting of each of the three defendants so as to justify their opinion as to the genuineness thereof, and that this court will presume the court below did its duty. But in this case it appears, *affirmatively* and *positively*, from the bill of exceptions, signed by the judge of the court who tried this cause, that at least *one* of these five witnesses did not identify *all* of the signatures of the defendants. Indeed, the fair

construction of this statement, in the bill of exceptions, is that each of the defendant's signatures had been identified by *two* or *more*, how many more does not appear, but *not all* of the five witnesses, while at least *one* or *more* did *not* identify *each* of such signatures. Some means a *part only*—not *all*—and yet each of these five witnesses was, against objection of the defendant, permitted to answer and did answer that he would act upon *all* of the signatures to the note in question if they came to him in ordinary business transaction.

It is confidently submitted, this testimony, for the several reasons suggested, was *incompetent* and tended to the prejudice of the substantial rights of the defendants, and each of them, and this assignment of error should be sustained.

POINT VII.

ASSIGNMENTS EIGHTH, NINTH, TWELFTH.

These three assignments will be considered together. They are as follows:

EIGHTH.

The court erred in permitting and requiring the witness, M. B. Holmes, to testify as to whether the name signed to the deed to Mrs. Palmer was his signature, and also in permitting either of the witnesses, John Dillard or R. Phipps, to testify as to the genuineness of their respective signatures to "a number of certain other papers" to be used on the trial of the cause as comparison papers, and in admitting such deeds and such "number of other papers" in evidence for comparison purposes or at all, and in permitting their use as comparison papers.

NINTH.

The court erred in admitting in evidence either of the two letters which were admitted to be in the handwriting of W. F. Owens, one of which was dated August 5, 1886, and the other September 18, 1886, as exemplars of Owen's handwriting, and in permitting their use by witnesses, court, and jury as comparison papers.

TWELFTH.

The court erred in failing to sustain the objection of plaintiffs' counsel to the following question propounded to the expert witness, Edward Failing, namely, that he "state whether or not, taking the handwriting there shown (the witness having been shown the two letters, *supra*, admitted as examples of Mr. Owens' handwriting) as the ordinary handwriting of W. F. Owens, you believe he could have forged the names upon the note in dispute so as to correspond so nearly with the names upon the comparison papers," and in permitting the witness, Failing, to answer said question.

These three assignments are based upon the following portion of the bill of exceptions (Record, 38, 39):

"Plaintiffs called M. B. Holmes, one of the defendants, as a witness and showed witness a deed dated May 14, 1879, purporting to be made by the witness, conveying lands to one Mrs. Palmer and asking the witness, 'state whether or not that is your genuine signature on that deed.'

"Defendants, by their counsel, then and there objected to the question as immaterial and irrelevant. The plaintiffs' counsel then stated that they desired to introduce this evidence and deed for a comparison paper and for no other purpose.

"The defendants, by their counsel, objected to the evidence and deed for that purpose upon the ground that plaintiffs could not prove a signature by witness to be used as a comparison paper by the jury or an expert.

The objection was overruled by the court, and defendants, by their counsel, then and there excepted, and the exception was allowed by the court. The witness answered that it was his genuine signature, and the deed was admitted in evidence and used as a comparison paper.

"A number of other papers with the name of this defendant on them, and the names of each of the other defendants, John Dillard and R. Phipps, respectively, (they each being called as witnesses by plaintiffs), were exhibited to each of them, and the same question asked, and the same objection made, and the same ruling of the court, and the same exception allowed by the court, and the same answer given by each of said witnesses respectively, and said papers were admitted and used as comparison papers.

"Plaintiffs' counsel exhibited two letters, one dated August 5, 1886, and one dated September 18, 1886, and defendants' counsel admitted that they are in the handwriting of W. F. Owens. Plaintiffs' counsel then stated: 'We now offer these in evidence as examples of Mr. Owens' handwriting for the purpose of asking our expert if the man who habitually wrote this hand was capable of forging such signatures as appear to this note in suit.' The defendants objected to the admission of the said letters for this or any other purpose as immaterial and irrelevant. The court overruled the objection, and defendants excepted, and the exception was allowed by the court, and the said letters were admitted in evidence." (Record, 38, 39.)

* * * * * * *

"The witness (Edward Failing) is shown the two letters admitted as examples of Mr. Owens' handwriting, and asked to state whether or not, taking the handwriting there shown as the ordinary handwriting of W. F. Owens, you believe he could have forged the names upon the note in dispute so as to correspond so nearly with the names upon the comparison papers. Defendants objected to the same as immaterial and incompetent. The objection was overruled by the court, and defendants excepted, and the exception was allowed by the court, and witness answered, 'I see no evidence in Mr. Owens' writing of any capacity to counterfeit the signatures on

the note in question. I think he could not have done so.' Owens' endorsements on the notes were proved, as also his death prior to the commencement of the action." (Record, 39.)

It is respectfully submitted the introduction of this evidence as to the signatures of the defendants to this deed and to the "number of other papers," and to their admission, and especially that of the two letters in evidence, and their use as comparison papers by the witness Failing, and also by the court and jury, were all incompetent, immaterial, and irrelevant, as not coming within any of the recognized rules of evidence on this subject as hereinafter stated, and all such evidence tended strongly to affect materially and adversely the substantial rights of the defendants, and should have been excluded.

But especially is reliance placed on the error alleged in assignments numbered ninth and twelfth.

The two letters of dates August 5, 1886, and September, 1886, as exemplars of Owens' handwriting were clearly inadmissible for that or any other purpose. Owens' handwriting was not in issue, as has been already stated. By this evidence an issue not in the case was raised, intended, and well calculated to mislead the jury. It was an assumption not warranted by anything in the case that if the names of defendants to the note in question were forgeries, that then such forgeries were committed by no other person than W. F. Owens.

But aside from the error in permitting these two letters in evidence, the question propounded to the witness Failing, and his answer thereto, surely were incompetent under any possible view of the case. This witness on being shown the two letters admitted to be in the handwriting of W. F. Owens, was asked the question:

"Taking the handwriting there shown as the ordinary handwriting of W. F. Owens, do you or not believe he

could have forged the names upon the note in dispute so as to correspond so nearly with the names upon the comparison papers?"

And he answered "I see no evidence in Mr. Owens' writing of any capacity to counterfeit the signatures on the note in question. I think he could not have done so." (Record, p. 39.)

With the same propriety might the court have admitted in evidence samples of the writing of Hyman Abraham, who testifies he wrote the body of the note in question, or of B. Goldsmith, or of the plaintiffs, or of any other person, and interrogated the expert as to whether, in his opinion, they or any of them could have forged the names in question.

The evidence, which to me seems wholly unsupported by any recognized rule of evidence, is only equalled in being absolutely destitute of justification by the expert evidence sought to be introduced in the case of McKeane *v.* Barnes, 108 Mass., 347. Its character will be understood from the following extract from the opinion of the Supreme Court, delivered in that case by Chief-Justice Chapman, who said:

"The testimony of the persons who were called to express their opinions whether a man could, within a short time, so improve his handwriting as shown by the standard signatures of the testator as to make a signature of as good a handwriting as that of the will, was incompetent. It was not a subject for the testimony of experts."

The character of expert testimony as a rule is such that the rules governing its introduction, it is submitted, should be circumscribed rather than enlarged.

Although, as stated by Wharton in his work on evidence, vol. 1, sec. 454, "When expert testimony was first introduced it was regarded with great respect," it is equally

true as stated by Lord Campbell in the Tracy Peerage Case, 10 Cl. & Fin., 191, and cited and approved by Prof. Wharton in sec. 455, *supra*, that—

"Skilled witnesses come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence."

The court, in Adams *v.* Field, 21 Vermont, 256, opinion by Judge Bennett, in speaking of expert evidence of handwriting, said:

"But those having much experience in the trial of questions depending upon the genuineness of handwriting, will not require to be reminded that there is nothing in the whole range of the law of evidence more unreliable, or where courts and juries are more liable to be imposed upon."

What is Assignable Error.

POINT VIII.

Query: Conceding that the evidence hereinbefore referred to or any of it was incompetent, as claimed, is the error such as is assignable and on account of which there should be a reversal of the judgment of the court below?

It is respectfully and confidently submitted it is.

In this connection it is conceded that no judgment should be reversed in a court of error when it is clear on the record that the error *could* not have prejudiced and *did* not prejudice the rights of the party against whom the ruling was made.

Lancaster *v.* Collins, 115 U. S., 227;
Deery *v.* Cray, 5 Wall., 807.

If it is clear that incompetent and irrelevant testimony has been introduced, then the case should be reversed

for error, *unless it further appears* that such error could not have prejudiced and did not prejudice the rights of the party against whom the ruling was made.

Lancaster *v.* Collins, 115 U. S., 222;
Huckley *v.* Pittsburg Steel Co., 121 U. S., 278;
Gilbert *v.* Moline Plow Co., 119 U. S., 494;
Lancaster *v.* Collins, 115 U. S., 222;
District of Columbia *v.* Woodbury, 136 U. S., 450;
Hornbuckle *et al. v.* Stafford, 111 U. S., 389.

"While it is true that where a question is asked which is illegal only because it may elicit improper testimony, and the court permits it to be answered against the objection of the other party, the injury done the party is by the answer, and notwithstanding the erroneous ruling of the court, if the witness knows nothing of the matter to which he is interrogated, or if his answer is favorable to the objecting party, it works him no injury. If it does, he can show it by making the answer a part of the bill of exceptions, and unless he does this there is no error of which a revising court can take notice."

Nailor *v.* Williams, 8 Wall., 109.

In the case at bar, however, it will be noticed, the answers of the witnesses to the questions alleged to have been incompetent and immaterial are fully set out, together with the objection of the defendants to such answers respectively, and exceptions noted, and which answers, it is respectfully submitted, were unfavorable and to the prejudice of the parties defendant.

In other words, where incompetent or irrelevant testimony has been allowed, the judgment rendered should be reversed for such error, *unless shown beyond doubt that it could not and did not prejudice appellant.*

Deery *v.* Cray, 5 Wall., 807.

In the case of Deery *v.* Cray, *supra*, Mr. Justice Miller, in delivering the opinion of the court, said:

"We concede that it is a sound principle that no judgment should be reversed in a court of error when the

error complained of works no injury to the party against whom the ruling was made. But whenever the application of this rule is sought, *it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the parties' rights.*"

Deery *v.* Cray, 5 Wall., 807.

Chief-Justice Marshall, in Smith *v.* Carrington (4 Curtis, 62), in discussing the question as to the admission of illegal evidence, where a copy of a paper had been improperly permitted to go to the jury, went still further and said:

"This copy, therefore, not being proved to be a true copy, ought not to have gone before the jury. Into its importance or operation this court can not inquire. It was improper testimony; and a verdict founded on improper testimony can not stand. For this error the judgment must be reversed, and the cause remanded to the Circuit Court of Rhode Island to be again tried."

Smith *v.* Carrington, 4 Cranch. (2 Curtis), 70.

AUTHORITIES.

Evidence of Handwriting.

THE OREGON STATUTES.

The common-law rule as it existed prior to the passage of the act of Parliament of 28–29 Victoria, C. 18, section 8, as to the proof of handwriting by the testimony of witnesses who have seen the party write or have personal knowledge of his writing, and also the well-recognized exceptions to the common-law rule, that testimony by the use of comparison papers or signatures is not admissible, are expressly prescribed by the Oregon Code.

Hill's Annotated Laws of Oregon, vol. 1, sections 764, 765, 706, and 766.

The last section named relates to ancient writings. It is only the three former, 764, 765, and 706, that could

have any application to the case at bar, provided the rule of evidence prescribed by the Oregon statute is to govern.

These sections are as follows:

"Sec. 764. The handwriting of a person may be shown by any one who believes it to be his, and who has seen him write, or has seen writing purporting to have been his, *upon which he has acted* or *been charged*, and who has thus acquired a knowledge of his handwriting."

"Sec. 765. Evidence respecting the handwriting may also be given by a comparison, made by a witness skilled in such matters or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered."

"Sec. 706. The opinion of a witness respecting the identity or handwriting of a person when he has knowledge of the person or handwriting; his opinion on a question of science, art, or trade when he is skilled therein."

It is respectfully submitted that it was the intention of the Oregon legislature by these provisions to re-enact the common-law rule, and the rule which has been invariably recognized by this court, notably in the late case of Williams *v.* Conger, 125 U. S., 398.

This view is strengthened by the note of the compiler appended to section 706, same volume, wherein, after stating the common-law rules, he says (p. 558):

"These rules for proof of handwriting are expressly prescribed by this code in sections 764–766."

To the common-law rule excluding as evidence the comparison of handwriting there are two well-recognized exceptions:

1st. Where the writings are of such antiquity that they can not be proved in the ordinary way, and yet are not so old as to prove themselves. In such a case other

writings may be produced which are admitted to be genuine or proved to have been acted upon and recognized as such by all parties, and persons skilled in handwriting, called experts, may be called to compare them and to testify concerning the genuineness of the contested instrument; and

2d. When other writings clearly proved are already in the case and before the jury. In such a case a comparison may be made by the jury themselves.

McAllister *v.* McAllister, 7 B. Munroe, 270:
Moore *v.* The United States, 91 U. S., 270;
Williams *v.* Conger, 125 U. S., 413.

This court in the case of Moore *v.* The United States, (91 U. S., 270), opinion by Mr. Justice Bradley, said:

"But the general rule of the common law disallowing a comparison of handwriting as proof of signature has exceptions, equally as well settled as the rule itself. One of these exceptions is that if a paper admitted to be in the handwriting of the party or to have been subscribed by him *is in evidence for some other purpose in the cause*, the signature or paper in question may be compared with it by the jury."

It is submitted the Oregon statute, sec. 765, was intended to incorporate this exception, and should be construed as such exception has been construed by this court.

"It is well settled that a witness who only knows a person's handwriting from seeing it in papers produced on the trial, and proved or admitted to be his, will not be allowed from such knowledge to testify to that person's handwriting, unless the witness be an expert *and* unless the writing in question is of such antiquity that witnesses acquainted with the person's handwriting can not be had."

Greenleaf on Evidence, sec. 578;
Williams *v.* Conger, 125 U. S., 413.

"It is also the result of the weight of authority that papers can not be introduced in a cause for the mere purpose of enabling the jury to institute a comparison of handwriting, such papers not being competent for any other purpose."

Greenleaf on Evidence, secs. 579–581;
Williams *v.* Conger, 125 U. S., 413.

Where two documents are properly in evidence, it is competent for the court or jury to compare them.

Griffith *v.* Williams, 1 Crompton and Jervis, 47;
Williams *v.* Conger, 125 U. S., 413.

"The rule as to the comparison of handwriting applies to witnesses who can only compare a writing to which they are examined with the character of the handwriting impressed upon their minds; but that rule does not apply to the court or jury, who may compare the two documents when they are properly in evidence."

Williams *v.* Conger, 125 U. S., 413.

"It is undoubtedly a general rule in courts of the United States that evidence by comparison of hands is not admissible, but at common law as declared by modern English courts, the court or jury acting without the intervention of witnesses, may compare a document in question with authentic writings of the party to whom it is ascribed if such writings are in evidence for other purposes, but not else."

Medway *v.* The United States, 6 C. Cls., 421.

The doctrine relating to evidence of handwriting, as laid down in the case of Medway *v.* The United States, 6 Ct. Cls., *supra*, where it is discussed at length, is quoted and approved by this court in the case of Williams *v.* Conger, 125 U. S.

It is submitted, therefore, that the rules of evidence applicable to this case on the proof of handwriting are these: 1st. That the handwriting of a person may be shown by a witness who has knowledge of the hand-

writing of the person in question, which knowledge may be obtained in two ways: 1st, by having seen the party write; 2d, from having seen letters, bills, or other documents purporting to contain the genuine signature of the party in question, and on which it is shown he has acted or been charged; and 2d, by a comparison made, *by an expert in such matters*, with writings properly in the case, admitted or treated as genuine by the party against whom the evidence is offered, and where the writing in question is of such antiquity that persons acquainted with the handwriting can not be had.

Williams *v.* Conger, 125 U. S., 413, and authorities therein cited.

But should it be held that the rules of the Oregon statute as to evidence of handwriting must control in this case, and should this statute be construed as authorizing evidence by comparison by an expert witness with writings shown to be those of the party whose signature is in dispute, irrespective of the question as to whether such comparison papers are proper evidence in the case for some other purpose, and of the question of the antiquity of the signatures in question, still in that event it is perfectly clear that it was not competent to introduce

Mutual Benefit Life Ins Co v Brown,
30 N. J. Eq., 201;

People v Morrigan, 29 Mich 8;

Am Law Review, Vol 1, 55;

Champ v Commonwealth, 2 Metcalfe (Ky), 27.

The Court Erred in Admitting the Note in Evidence.

ASSIGNMENT THIRTEENTH.

POINT IX.

This assignment is to the effect the court erred in admitting in evidence the promissory note set out in amended complaint. If the suit is on the note, the legal construction of which, and the rights and obligations of the several parties to which, are unchanged by parol, then it is conceded the note—being the subject-matter of the suit—is properly in evidence, and plaintiffs must stand or fall by such construction as the law attaches to such a note and indorsement. If, however, these implied contracts, or the contracts as shown on the face of the papers, the note and its endorsements, are to be changed by parol, then the suit is *not* on the note, and its introduction as evidence was not proper. In such case the proof does not correspond with the allegations.

The Evidence is Insufficient to Sustain the Averments in Reference to the Jurisdiction of the Court.

ASSIGNMENT FOURTEENTH.

POINT X.

This assignment is to the effect that the court erred in overruling motion of defendant's counsel to set aside the verdict, and in rendering judgment on the verdict.

While this court can not review the weight of evidence as set out in the bill of exceptions, it can look into it for the purpose of ascertaining whether there was error in not directing a verdict for the plaintiffs, on account of the variance between the allegations and the proofs,

and also for the further reason that there was no sufficient evidence to sustain the verdict on the question of jurisdiction.

It is respectfully submitted, in the first place, that the evidence set out in the bill of exceptions and which (Record, 36) is, in the language of the bill of exceptions, declared to be "*in substance all the evidence given as to the terms of the contract between the plaintiffs and the defendants for the loan of this money, or of the transfer of the note in suit to the plaintiffs, except the note itself and the indorsement thereon,*" does not correspond with the material allegations of the complaint; and secondly, should it be held it does so correspond, then it was wholly insufficient to sustain the averments or uphold a verdict, and for this reason the court below erred in not, on its own motion, charging the jury that the evidence was insufficient to sustain the jurisdiction of the court, in failing to set aside the verdict and directing a dismissal of the suit for want of jurisdiction, and in rendering judgment on the verdict.

But for the fact that it is stated in the bill of exceptions that the *only* evidence upon this branch of the case was that of the witness Hyman Abraham, this court would perhaps presume that other and sufficient evidence to confer jurisdiction was introduced, but as *all* the evidence is according to the bill of exceptions now before this court, it is proper it should be considered, and if found, as it seems to me it must be, wholly insufficient to confer jurisdiction, then it is the duty of this court on the authorities heretofore cited to reverse the judgment of the court below for this reason and direct a dismissal of the case.

According to this bill of exceptions it *appears affirmatively* that the *only* evidence to sustain the jurisdiction of the court is that of the *one* witness, Hyman Abraham.

A careful consideration of this evidence fails to disclose *one particle of evidence* showing or tending to show any understanding or agreement on the part of the defendants, or any of them, to the effect that they signed such note for the purpose of enabling Owens to secure a loan from these plaintiffs, or that they or any of them had any knowledge that such was the intention of Owens at the time it is alleged such notes were signed. There is no scintilla of evidence that defendants or any of them ever saw either of the plaintiffs, or their agent, B. Goldsmith, or the agent of Owens, Hyman Abraham, or Owens himself, or had any communication whatever with any of them in connection with the signing of these notes. The only evidence is as to what took place between Owens and the witness Abraham, and between the witness, Abraham, and B. Goldsmith, as the agent of plaintiffs, and it nowhere is shown that any of these ever heard any of the defendants say anything in reference to the transaction, nor do they claim, so far as shown by the testimony, that any of these persons, Abraham, B. Goldsmith, Owens, or the plaintiffs were present at the time it is alleged said note was signed by the defendants.

Conceding the competency of the testimony of the witness Abraham, surely there is nothing in it even tending to prove that the defendants, or any of them, had any knowledge whatever that Owens was to obtain a loan, or contemplated obtaining a loan on this note from any citizen of a State other than Oregon, much less of these plaintiffs, and thus without their knowledge place them in a position to be sued in a Federal court. If they signed this note as makers, for the purpose of enabling Owens to obtain a loan directly from a citizen of another State, then there should be at least *some* evidence to sustain such averment, otherwise this court is without juris-

diction in any possible view that may be taken of the law of this case. Inasmuch, therefore, as there is no evidence which, properly considered, can be construed as affecting these defendants, or any of them, in support of the averment in the amended complaint on which hinges the question of jurisdiction, it follows that for this reason alone the judgment of the court below should be reversed and directions given for the dismissal of the suit because of lack of jurisdiction in that court.

All of which is respectfully submitted.

JOHN H. MITCHELL,
Attorney for Plaintiffs in Error.

147 U.S. 150

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

M. B. HOLMES, JOHN DILLARD and R. PHIPPS, Plaintiffs in Error,

vs.

L. GOLDSMITH and MAX GOLDSMITH, Partners under the firm name of L. GOLDSMITH & CO., Defendants in Error.

No. 93.

In Error to the Circuit Court of the United States for the District of Oregon.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

L. B. COX,
of Counsel for Defendants in Error.

PORTLAND, OREGON:
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1892.

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STATEMENT.

In making a brief statement of the case, we do not wish to be understood as impeaching such statement as may be submitted by the plaintiffs in error. We have not their brief before us, for which reason, and because of the simplicity of the facts involved, we venture to insert a succinct historical review of the case.

At the time of the happening of the events connected with this cause, the defendants in error were money loaners, residing in the city of New York, and were represented in Portland, Oregon, by B. Goldsmith, as their agent. In July, 1886, one W. F. Owens, a citizen of the State of Oregon, and resident of the town of Roseburg, wrote a letter to one Hyman Abraham, a resident of the city of Portland, asking him to secure a loan of $10,000 for the writer, and representing that he could give as security therefor the plaintiffs in error, Dillard and Phipps, and one G. W. Jones; Abraham applied to B. Goldsmith for the loan, and, giving satisfactory assurances as to the responsibility of the parties, was promised the money; he communicated this fact to Owens by letter, and shortly received a reply in which Owens represented that Jones declined to sign the note, but that he could get the plaintiff in error, Holmes, in his stead; Abraham again called on B. Goldsmith, and, upon his representation that the exchange was a good one, was told that the loan would be made upon the strength of the names of the three plaintiffs in error; this information was communicated by Abraham to Owens, and by way of reply the latter sent the note in suit; Abraham then presented the note to B. Goldsmith, procured the money for which it called from Goldsmith, as agent of the defendants in error, and placed it in a Portland bank to Owens' order. (Record, p. 36.)

Prior to the maturity of the note, Owens died by his own hand, and the note being unpaid, action was commenced upon it on November 18, 1887, against the plaintiffs in error.

The cause is here upon an amended complaint, the allegations of which are as follows, viz.; (Record, pp. 13-14.)

"The above named plaintiffs, L. Goldsmith and Max Goldsmith, citizens of the State of New York, complain of the above named defendants, M. B. Holmes, John Dillard and R. Phipps, citizens of the State of Oregon, and, by way of amended complaint, allege;

"That at all the times hereinafter mentioned the plaintiffs were, and they now are, citizens of the State of New York, and that at all such times the defendants were, and they now are, citizens of the State of Oregon.

"That at all the times hereinafter mentioned the plaintiffs were, and they now are, partners doing business in the city of New York, under the firm name of L. Goldsmith & Co.

"That on or about the first day of August, 1886, one W. F. Owens applied to the plaintiffs for a loan of ten thousand dollars ($10,000), offering to give therefor a promissory note with such additional parties thereto as should be approved by the plaintiffs; to which application, upon the condition stated, the plaintiffs acceded.

"That thereupon, on the 9th day of August, 1886, said Owens procured the defendants to execute and deliver to him their certain promissory note in writing, in words and figures as follows, to-wit;

Portland, Oregon, August 9th, 1886.

"$10,000.00.

Six months after date, without grace, we, or either of us, promise to pay to the order of W. F. Owens, ten

thousand dollars, for value received, with interest from date at the rate of ten per cent. per annum, until paid, principal and interest payable in U. S. gold coin at the First National Bank, in Portland, Oregon; and in case suit is instituted to collect this note, or any portion thereof, we promise to pay such additional sum as the court may adjudge reasonable as attorneys' fees in said suit.

No. 40,190. M. B. HOLMES.
Due Feb 9th, '87. JOHN DILLARD.
R. PHIPPS.

"That thereupon, on said 9th day of August, said Owens indorsed said note, by writing his name in blank upon the back thereof, and at the same time subscribed his name to the following indorsement, written upon the back of said note, to-wit; 'For value received I hereby waive on the within demand, notice and protest,' and delivered said note to the plaintiffs as security for the repayment of the said proposed loan; whereupon said plaintiffs approved and accepted said note, and advanced to said Owens the said sum of ten thousand dollars ($10,000.00).

"That said defendants executed said note for the accommodation of said Owens, to enable him to procure said loan thereon, and not otherwise, and that said Owens was, in fact, a maker of said note to the plaintiffs, and never had any cause of action thereon against the defendants.

"That said note is wholly unpaid.

"That one thousand dollars ($1,000.00) is a reasonable attorney's fee in this action.

"Wherefore, said plaintiffs demand judgment against said defendants for the sum of ten thousand dollars ($10,000.00), with interest thereon at the rate of ten per cent. per annum from the 9th day of August, 1886, and for one thousand dollars ($1,000.00), attorney's fee, and for costs and disbursements of this action."

To this complaint the plaintiffs in error interposed a general demurrer, based on the following grounds, viz.; (Record, p. 15.)

"Now come the defendants above named and demur to the amended complaint filed herein, because;

"1. This court has no jurisdiction of the subject of this action.

"2. This court has no jurisdiction of the person of either of these defendants.

"3. The amended complaint does not state facts sufficient to constitute a cause of action."

This demurrer was brought before the court and argued by counsel, and on the 5th day of November, 1888, it was overruled, the judgment of the court being accompanied by an opinion which appears at large on pages 16-19 of the record.

On the 27th day of November, 1888, the plaintiffs in error filed an answer denying their execution of the note, and taking general issue with the allegations of the complaint. Upon the issues thus joined, the cause was twice tried before a jury, the first trial resulting in a disagreement and the second in a verdict for the defendants in error, upon which the judgment was rendered from which this writ of error has been taken. (Record, pp. 22-29.)

ASSIGNMENTS OF ERROR.

The plaintiffs in error submit here the following assignments of error, viz.; (Record, pp. 31-2.)

"1. The court erred in overruling the demurrer of the defendants to the amended complaint herein, because the court had no jurisdiction either of the subject of the action or of the persons of either of the defendants, and said amended complaint did not state facts sufficient to constitute a cause of action.

"2. The court erred in permitting the witness, H. Abraham, to testify as to what was said by and between the witness and B. Goldsmith and W. F. Owens in the absence of and without the hearing of the defendants.

"3. The court erred in permitting the witness, H. Abraham, to testify as to what W. F. Owens wanted with the money he borrowed on the note sued on herein.

"4. The court erred in permitting the witness, H. Abraham, to testify as to what were the relations between the defendants and W. F. Owens.

"5. The court erred in admitting as evidence the book of certificates of stock in the Grange Business Association.

"6. The court erred in permitting the witness, J. S. Fitzhugh, or either of the witnesses, B. Brockway, V. L. Arrington, S. Caro, D. S. K. Buick or E. G. Hirsh, to testify as to whether he would act upon the signatures of the defendants attached to the note sued on, if they came to him in an ordinary business transaction.

"7. The court erred in requiring or permitting the witness, M. B. Holmes, to testify as to whether the

name signed to the deed to Mrs. Palmer, was his signature, and also in requiring or permitting either of the witnesses, John Dillard or R. Phipps, to testify as to the genuineness of their respective signatures, to be used on the trial of the cause as comparison papers, and in admitting such deed and such papers in evidence as or for comparison papers, or at all.

"8. The court erred in admitting in evidence either of the two letters which were admitted to be in the handwriting of W. F. Owens, one of which was dated August 5, 1886, and the other dated Sept. 18, 1886, as exemplars of Owens' handwriting.

"9. The court erred in permitting the witness, Edward Failing, to testify that the signature of Geo. W. Jones was as susceptible of imitation as that of either of the names to the note.

"10. The court erred in permitting the witness, Edward Failing, to testify that taking the handwriting shown in the two letters admitted as exemplars of Owens' handwriting, as the ordinary handwriting of W. F. Owens he, witness, did not think Owens could counterfeit the signatures on the note sued on.

"11. The court erred in admitting in evidence the note sued on."

ARGUMENT.

I.

We apprehend that the serious question in this case will be as to the propriety of the action of the trial court in overruling the demurrer to the amended complaint. As singular as it may seem, we have been unable to discover that the point involved here, or any similar one,

has ever reached this court. And in the whole range of federal decisions, we have been able to find but one which has any apparent direct bearing, as a precedent, upon the question under consideration. This is the case of *Noell vs. Mitchell*, 4 Biss., 346, which was an action brought on a promissory note made by one citizen of Indiana to another, and by him indorsed to a citizen of New York. It was sought to give the court jurisdiction by alleging that the payee was one for accommodation only, but McDonald, J., held that the action would not lie. We would deny the soundness of this decision, except for the theory that as the payee would have an action on the note against the maker, in the event of his being required to pay it, the case was not excepted from the statute; but, while the sufficiency of such a reason is not perceived, this would make it easily distinguishable from the present case, in which the payee under no circumstances could sue.

Heckscher vs. Binney, 3 W. & M., 333, presents the case of a principal, claiming by indorsement, suing on a note made to an agent, and here Justice Woodbury denied the existence of jurisdiction. We think this case is of no force in connection with the discussion in hand; and while there are other decisions touching generally upon various aspects of the rights of assignees of *choses in action* in connection with the jurisdiction of the federal courts, we believe no precedent of controlling weight can be found in the reports. We claim, however, that there is general authority for our position, and resting upon such authority, with principles and analogies for our guide, we confidently submit our case to the court.

Section 11 of the judiciary act provided: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other *chose in action*, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made; except in cases of foreign bills of exchange."

Under this act it was held that notes payable to bearer, and in the hands of subsequent parties, were suable in the federal courts.

The act of March 3d, 1875, conferred jurisdiction over all cases of promissory notes negotiable by the law merchant and bills of exchange; but in the act of March 3d, 1887, a long backward stride was taken, it being provided in section one, that no circuit or district court shall "have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other *chose in action* in favor of any assignee, or of any subsequent holder, if such instrument be made payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

It may be safely said that recourse to the federal courts was considered a circumstance of value in connection with the circulation of negotiable paper under the act of 1875, and when jurisdiction over actions involving such paper was restricted by the later act, there ought to have been an exception covering existing contracts; but none was made, and we must take the law as it stands.

We say above that we have been unable to find any decision of this court directly bearing upon the point involved as a precedent. The expressions which have been used in connection with the general question of jurisdiction in cases of assignment have varied with the nature of the cases presented. For instance, in *Bradley vs. Rhines*, 8 Wall., 393, Justice Miller says, that, "when a party claims in the federal courts through an assignment of a *chose in action*, he must show affirmatively that the action might have been sustained by the assignor if no assignment had been made"; while in *Bushnell vs. Kennedy*, 9 Wall., 387, Chief Justice Waite, uses this language: "Nor can it be denied that every suitor who brings an action in a court of the United States, must aver in his pleadings a state of facts which, under the national constitution and laws, gives to the court jurisdiction of his suit." There is no incompatibility in these statements. Legal opinions are to be read in the light of the facts to which they apply. The first case goes to establish a principle applicable to ordinary cases of actions by assignees; the second recognizes the fact that there may be exceptions, and announces a rule applicable to such exceptions. This will appear more clearly from the context which follows, and from which we will quote further on.

Upon the issues in controversy, two propositions directly arise, viz.;

1. Will the allegations of the complaint to the effect that the defendants in error were the first holders for value of the note sued on, take the place of an allegation that their assignor might have sued in the federal court?

2. Can evidence be heard to establish such fact in the face of the recitals of the note ?

The jurisdiction of the federal courts in cases between citizens of different states is a salutary one, and while it ought never to be subjected to abuse, on the other hand it should never be denied in any case which fairly falls within the true intendment of the constitutional and statutory provisions conferring it, and when to maintain it would do no violence in the construction of the statute. Says Deady, J., in passing upon the demurrer: "The jurisdiction of this court is presumably a beneficial one, and therefore the law conferring it is not to be strictly construed, but rather the exception to it. The exercise of this jurisdiction tends to promote confidence and commercial intercourse between the citizens of the several states of the Union, by furnishing them a comparatively impartial tribunal wherein to adjudicate and enforce the controverted and unsatisfied claims growing out of such intercourse." We commend this entire opinion to the court, as setting forth a sound exposition of principles applicable to the point under consideration.

One of the cardinal rules in the construction of restrictive provisions of this character is the ascertainment of the evil against which the restriction is leveled. If a given case, under this statute is tainted with an obnoxious element, it should be governed by the letter of the law, for it is contrary to its spirit ; but if there is freedom from such taint, the spirit of the act will not apply ; and the spirit, not the letter, is to be taken as our beacon light. This is strikingly illustrated in the well-known case of *Jackson vs. Collins*, 3 Cow., 89, in

which the title to real estate depended upon a purchase made for a deputy sheriff at an execution sale upon a writ directed to his superior officer. There was at the time a statute in force in the State of New York which provided, "that it shall not be lawful for any sheriff, or other officer, to whom any such execution shall be directed, or any of their deputies, or any person for them, or either of them, to purchase any goods or chattels, lands or tenements, at any sale, by virtue of any execution, and all purchases so made by them, or any of them, or for the use of them, or any of them, shall be void." The deputy sheriff, for whom the purchase was made, was owner of the judgment under which the property was sold, and the statute was held not applicable to his case. Savage, C. J., speaking for the court, says in the course of their opinion: "'Whenever the intention of the makers of a statute can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seems contrary to the letter of the statute.' (Bac. Ab. tit. Statute, (1), 15 Johns., 380, per Ch. J. Thompson). A thing which is within the letter of a statute is not within the statute, unless it be within the intention of the makers."

In Potter's Dwarris on Statutes, p. 144, the American editor cites this authority with approval, and lays down the following as a standard rule of interpretation, viz.; "A thing within the *intention*, is within the statute, though not within the letter; and a thing within the letter, is not within the statute, unless within the intention."

Mr. Sutherland, in his work on Statutory Construction, §411, states the rule thus; "The courts construe remedial statutes most liberally to effectuate the remedy. This principle operates to exclude as well as to include cases in furtherance of the law-makers' intention. That which is not in the purpose or meaning, nor within the mischief to be remedied, is not included in the statute, even though it be within the letter. The courts follow the reason and spirit of such statutes till they overtake and destroy the mischief which the legislature intended to suppress. In doing so they often go quite beyond the letter of the statute. What is within the intention is within the statute, though not within the letter; and what is within the letter, but not within the intention, is not within the statute."

See also Sedgwick on Statutes, p. 254 *et seq.*

The object of our national legislators in imposing this restriction as to suits by assignees has been declared by the federal courts time and time again. In speaking of the eleventh section of the judiciary act, Justice Washington said in *Bobyshall vs. Oppenheimer*, 4 Wash., 482, "The policy and design of the eleventh section was to prevent the making of assignments of *choses in action for the purpose of giving jurisdiction to the court.*" And in *Bushnell vs. Kennedy, supra,* Chief Justice Waite says: "Not a little apprehension was excited at the time of the adoption of the constitution in respect to the extent of the jurisdiction vested in the national courts; and that apprehension was respected in the judiciary act, which soon afterwards received the sanction of congress. It was obvious that numerous suits, by assignees, under assignments made for the

express purpose of giving jurisdiction, would be brought in those courts if the right of assignees to sue was left unrestricted. It was to prevent that evil and to keep the jurisdiction of the national courts within just limits that the restriction was put into the act."

In the case at bar the facts, if they can be shown, would completely negative any imputation of a design to evade the restriction found in the act of 1887, even if it had been in force at the time the note was assigned; but, as the matter stands, such a suggestion is wholly foreign to the case.

There is authority for the position we take here, for in connection with the passage last above quoted Chief Justice Waite further says;

"Two questions then arise in this cause;

"(1st). Whether the 11th section of the judiciary act applies to a suit instituted by the assignees of such a *chose in action* as is shown in the pleadings.

* * * * * * * * * *

"Upon the first question, it may be observed that the denial of jurisdiction of suits by assignees has never been taken in an absolutely literal sense. It has been held that suits upon notes payable to a particular individual or to bearer may be maintained by the holder, without any allegation of citizenship of the original payee; though it is not to be doubted that the holder's title to the note could only be derived through transfer or assignment. So, too, it has been decided, where the assignment was by will, that the restriction is not applicable to the representative of the decedent."

An exception was also declared in *Bobyshall vs. Oppenheimer, supra*, in favor of the assignee of a bail bond running to the marshal in an action in that court, on the ground that the bond was but an incident of the proceeding in which it was taken, and so did not fall within the statute.

In the case of *Bradley vs. Rhines, supra*, it appears, though the statement of facts is meagre, that an action was brought by an assignee of a lease for breach of its covenants. The assignor could not have sued in the federal courts, and it was sought to avoid the effect of the statute by contending that the assignee of the lease had also become owner of the demised premises. Justice Miller held that the lease was a *chose in action* within the strict purview of the statute, but intimated that a purchase of the land might have been shown by the plaintiff, and that thereby the court would have taken jurisdiction, but the point was not sustained for want of such proof.

Apart from any question of authority, however, we are willing to submit our contention to the court, as one altogether sound upon principle and reason. In our land every one has recourse to some court for the redress of grievances, and the terms of the act in controversy must be taken as presupposing that, in cases falling within its intendment and effect, the assignor of any given *chose in action* had a right of suit thereon in *some* court. Indeed, in the case of *Bullard vs. Bell*, 1 Mason, 243, 253, in which it was first held that a note payable to bearer was not within the restriction of the judiciary act, Justice Story, who was always careful in judicial utterances, says: "The statute is intended to

apply only to promises made to persons *in esse*, having a certain and fixed character of citizenship, or alienage ; and who might technically make an assignment, sue and be sued."

Until the note in controversy reached the defendants in error for valuable consideration, it was wholly inchoate, of no force or effect whatever, and their assignor not only had no right of action in the federal court, but he had none at all. As was well said by the court below, "It was made by the defendants for the accommodation of Owens, and until he wrote his name on it and delivered it to the plaintiffs no one was liable on it, or could maintain an action thereon. It was in fact Owens' own note, with these defendants as his co-makers and sureties, on which he borrowed the money of the plaintiffs and of which he was to all intents and purposes the maker."

Catlin vs, Gunter, 11 N. Y., 368.
Clark vs. Sisson, 22 Id., 312.
Whitworth vs. Adams, 5 Rand., 333.
Brummel vs. Enders, 18 Gratt., 873.
Barnes vs. Richardson, 5 Barn. & Ald., 674.

But this is elementary.

Suppose, instead of drawing the note in the form which was adopted, Owens, with himself as payee, had signed it as a joint and several maker with the plaintiffs in error. Under a statute of Oregon the plaintiffs in error might have been separately sued by an indorsee,

and probably no one would deny the existence of jurisdiction in the federal court ; and yet that case would be no more in form than this is in fact.

This brings us to our second point,—as to whether parol evidence of the real relations of the parties can be introduced. If such proof would be availing under the foregoing theory, it is not obnoxious to any rule of law with which we are familiar. It does not vary the contract between the parties in any sense, but simply shows the truth as it actually exists. The sole defense is a denial of the execution of the note, and such evidence does not contravene any provision of the act of 1887, but merely fixes the rights of the parties as they stood at the time the contract was entered into, if it was in fact entered into, as the jury have found. It is true that since that time a change in the law gave the plaintiffs in error an apparent exemption from one of the incidents attaching to their engagement, but it is one of which we seek to show, upon the real merits of the case, they ought not to be allowed to take advantage. Their promise continues in every essential particular the same as to amount, time and place of payment, and every other circumstance connected with it. In fact it cannot be said in any sense that the offer to show the facts falls within the purview of the rule forbidding the introduction of parol evidence to affect written contracts.

If we may reason by analogy from the cases in which parol evidence is allowed to establish or defeat a defense as to the binding force of a contract, we will find ample authority to sustain our contention here. The admission of such evidence has been based upon the ground

that otherwise one party would be allowed to perpetrate a wrong upon the other ; and if recourse to the federal courts on behalf of non-residents is a valuable right, the denial of it in a proper case under the cover of this rule, would be as much a wrong as to deny the opportunity to establish or defeat an actual recovery, and with far less reason.

This entire transaction is, in fact, one occurring immediately between all the parties to the paper, each knowing exactly the position of the other at the time of its execution. Had Owens sued the plaintiffs in error upon this note, they could have shown that it was accommodation paper in his hands. And so in this case it might have been pleaded that the plaintiffs in error were minors, or that they were sureties for Owens and had been discharged by indulgence granted him by the defendants in error, or that they had been released by the operation of a statute of limitations more favorable to sureties than to principals, had facts existed to warrant such defenses.

Were one to undertake to thread the maze of adjudicated cases on the question involved here, he would run great risk of becoming lost in a wilderness of conflicting facts and disconsonant legal conclusions, so that we shall endeavor to cite only such authorities as are entitled to conceded weight, and have a distinct bearing upon the question under consideration. It may not be amiss to remark, in passing, that cases in which parol evidence has been excluded are in large measure those where a party has thereby sought to escape liability upon his contract, and it would seem a less stringent rule

might be applied where the object is to hold him to his undertaking according to its just intent and purpose, *ut res magis valeat quam pereat.*

Various illustrations of the admissibility of parol evidence in connection with negotiable paper will be found in the following cases :

Sweet vs. McAllister, 4 Allen, 353. It was broadly stated in this case that, "It may be proved by parol that the relation of the parties to each other was different from this [the face of the paper] ; for example, that the payee or indorsee was the real principal, or that all the parties were joint principals, or some of them joint sureties."

Harris vs. Brooks, 21 Pick., 195. This was a suit by the indorsee of a note after maturity against two makers. One maker successfully defended on the ground that, though joint maker in form, he was in fact surety for the other maker and had been discharged by the agreement of a prior holder that he would look to the principal. Shaw, C. J., speaking of the effect of makers annexing the words "principal" and "surety" to their signatures, says: "They indicate the relation in which the parties stand to each other, and notice of such relation to the holder. But the fact of such relation, and notice of it to the holder, may, we think, be proved by extrinsic evidence. It is not to affect the terms of the contract, but to prove a collateral fact and rebut a presumption."

Guild vs. Butler, 127 Mass., 386. The last case was affirmed here, and it was held that a surety was entitled to the benefit of any security given by the principal to

his creditor; that the surrender of such security would operate as a discharge of the surety to the extent of its value; that the fact of suretyship might be shown by parol; and that an accommodation maker was a surety within this rule.

Brooks vs. Thacher, 32 Vt., 559. Here there was a question as to whether a party to a note was principal or surety, and Redfield, J., said: "But the real relation of the parties to a written instrument, whether as principals or sureties, may always be shown by parol evidence."

Mariner's Bank vs. Abbott, 28 Me., 280. In this case it was held in an action against several makers of a note, that one might show he was a surety only, and had been released by an extension of time given his principal. In the course of the opinion it is said: "Where there are two or more promissors, the presumption it is said, is, that they are equally liable to pay, but this presumption may be rebutted, not only between the debtors themselves, but between them and the creditor. *Harris vs. Brooks*, 21 Pick., 195. And it is also said that it is a fact collateral to the contract, and no part of it, showing the relation, in which the promissors stand to each other, and if it can be inquired into, to adjust the relations of the debtors to each other, it can be to determine the relation of the creditor to each debtor, where the fact becomes material to the respective rights. *Carpenter vs. King*, 9 Metc., 511."

Grafton Bank vs. Kent, 4 N. H., 221. Here the facts and the defense were similar to those of the last

case, and Richardson, C. J., says: "Wherever it is material, a defendant may show by extrinsic evidence that he made the note as a surety only, and that it was known to the plaintiff that he was only surety."

Otis vs Von Storch, 15 R. I., 41. A case of latent suretyship in which there was a surrender of securities, and a defense on such ground was held admissible.

Hubbard vs. Gurney, 64 N. Y., 457. Here it was held that one of two joint makers of a note, when sued by the holder, could show by parol that he signed the note as surety for the other maker, and had been discharged by an extension of time given his principal. The opinion by Church, C. J., contains a masterly discussion as to the admissibility of parol evidence in such cases.

Breneman vs. Furniss, 90 Penn. St., 186. This was an action by a holder of a check against the payee and endorser, and the defendant was permitted to show that he had allowed the use of his name as a matter of accommodation to the plaintiff, and so escaped liability.

Brummel vs. Enders, 18 Gratt., 873. Action on a promissory note; defense, usurious loan; replication, denial of loan and claim of purchase of the note in the ordinary course of business notwithstanding its recitals, (the note having been taken with the name of the payee blank, and that of the plaintiff's firm having been afterwards inserted). In the majority opinion of the court it is said: "Moreover, the law does not hold that the true relations between the parties to a negotiable instrument are conclusively indicated by its form. Thus, if it appears on the face of the bill or note sued on, that the plaintiff was the immediate promissor [promissee] of

the defendant, it is admissible for the plaintiff to show by evidence *aliunde* that he was not such immediate promissor [promissee] in point of fact, but that the paper came to him through other hands, and thus exclude evidence that might otherwise be given to impeach the consideration."

Davis vs. Morgan, 64 N. C., 570. A case of an endorsee of a promissory note claiming to have paid it and bringing suit thereon against his endorser. Parol evidence was admitted to show that the payment was made by the plaintiff as agent of the maker, and the action was thereby defeated.

Emmons vs. Overton, 18 B. Mon., 643, and *Day vs. Billingsly*, 3 Bush, 157. In each of these cases a joint maker, in form, of a note, was allowed to show by parol that he was a surety and had been discharged by the operation of the statute of limitations.

Flynn vs. Mudd & Hughes, 27 Ill., 323. This is also an instance in which a joint maker sued by the holder of a note, was allowed to show that he was a surety, and had been discharged on the ground of indulgence granted the principal.

Stevens vs. Oaks, 58 Mich., 343. This is another illustration of the same point.

National Bank vs. Brush, 10 Biss., 188. An action against the payee and endorser of a promissory note. It was alleged in defense that the maker was desirous of obtaining a loan on real estate security from the plaintiff, but national banks being prohibited from loaning

directly on such security, as an evasion of this restriction, it was agreed that the note should be made to a third party, and by him endorsed to the bank; consequently, want of consideration was pleaded and allowed.

Perhaps it may now be in order to tender an apology for the citation of such an array of authorities upon a proposition so well established, but it has seemed to us that the variety of illustrations and the reasoning of the courts as set forth in the cases may serve some useful purpose.

Looking at the question of the trial court's disposition of this demurrer, we submit with confidence that it was free from error.

II.

The second assignment of error is that, "The court erred in permitting the witness, H. Abraham, to testify as to what was said by and between the witness and B. Goldsmith and W. F. Owens, in the absence of and without the hearing of the defendant." (Record, p. 31.)

The objectionable matter is set forth in the bill of exceptions as follows, viz.; (Record, p. 36.)

"A jury having been empanneled and sworn to try the issues in said cause, Hyman Abraham was called and sworn as a witness on behalf of plaintiffs, and in response to the question, 'Have you seen this note before; and, if so, when and where' (exhibiting to the

witness the note set out in the complaint)? The witness answered that he had seen the note before; that W. F. Owens, the payee of the note, wrote to the witness in July, 1886, to secure a loan for him, Owens, of $10,000, and proposed giving for security for such loan John Dillard, R. Phipps and G. W. Jones, and that he, witness, called on B. Goldsmith, agent for the plaintiffs, and told him—(objection interposed and overruled).

"The witness, then continuing, answered that he, witness, told B. Goldsmith, that that would be gilt-edge security, and Goldsmith said he would make the loan, and witness then wrote the note sued on and sent it to Owens, and wrote Owens what B. Goldsmith said. Owens soon after wrote witness that Jones would not sign the note, but that the defendant, Holmes, would in his place; that witness then saw B. Goldsmith again and told him what Owens had written, and that he, witness, thought Holmes as good as Jones, and B. Goldsmith then said he would make the loan to Owens on the security of the defendants, Holmes, Dillard and Phipps. Witness then again wrote Owens what Goldsmith said, and Owens then sent the note in suit, signed and endorsed as it now appears, to witness, who then presented it to B. Goldsmith, and from him, as agent and on behalf of the plaintiffs, procured the sum named in the note,—ten thousand dollars,—and placed it in the First National Bank of Portland, Oregon, subject to the order of W. F. Owens."

The objection to this testimony is untenable on several grounds. It is not claimed by any one, nor could it have been understood, that the matter could have had any direct effect towards binding the plaintiffs in error

by any declarations made by Owens as to his ability to secure their signatures to the note; but it would have been permissible, we think, for the general purpose of unfolding the character of the case, and enabling the court and jury to start off with some intelligent foresight and comprehension of the issues to be tried. As affecting Owens' relation to the paper, and supporting the allegations of the complaint upon which the question of jurisdiction rested, the testimony was indispensable; and in Holmes' case, it was proper upon the merits, as is developed by further evidence to which we shall presently advert.

III, IV.

The third assignment of error is that, "The court erred in permitting the witness, H. Abraham, to testify as to what W. F. Owens wanted with the money he borrowed on the note sued on herein." (Record, p. 31.)

The fourth is that, "The court erred in permitting the witness, H. Abraham, to testify as to what were the relations between the defendants and W. F. Owens." (*Ib.*)

The two assignments can conveniently be considered together.

The bill of exceptions recites (record, pp. 36-7) that, "Plaintiffs then asked the same witness [Abraham]:

" 'What, if you know, did Owens want this money for?'

"To which question defendants, by their counsel, then and there objected upon the ground that the question called for irrelevant and immaterial testimony, which objection was overruled by the court.

"And witness answered, 'As near as I can remember, Owens said he wanted the money to pay on wool in his business.'

"To which ruling of the court and answer of the witness defendants, by their counsel, then and there excepted, and such exception was duly allowed by the court.

"Counsel for plaintiffs also asked the same witness, 'What, if you know, were the relations between the defendants and W. F. Owens?'

"To which question defendants, by their counsel, objected upon the ground that the question called for immaterial testimony; which objection was overruled by the court, and the witness answered: 'They were very intimate, particularly Phipps. I saw him at the Grange warehouse at Roseburg frequently, for years before this time.' The witness also testified that Owens was engaged in conducting business at what was known as the warehouse of the Grange Business Association of Roseburg, Oregon.

"To which ruling of the court and answer of the witness, defendants then and there excepted, and such exception was duly allowed by the court."

In Vol. 7, American and English Encyclopædia of Law, p. 55, a concise, but at the same time comprehensive, statement of legal principles governing such cases, illustrated and supported by the citation of a number of authorities, is thus given :

"Facts necessary to be known to explain or introduce a fact in issue, or relevant, or deemed to be relevant, to the issue, or which support or rebut an inference suggested by any such fact, or which establish the identity of any thing or person whose identity is in issue, or is, or is deemed to be, relevant to the issue, or which fix the time or place at which any such fact happened, or which show that any document produced is genuine or otherwise, or which show the relation of the parties by whom any such fact was transacted, or which afforded an opportunity for its occurrence or transaction, or which are necessary to be known in order to show the relevancy of other facts, are deemed to be relevant in so far as they are necessary for those purposes respectively."

It is also a general rule of law that a party is held only to the production of the best evidence within his reach, and where he is driven to the maintenance of his case by circumstantial evidence, much latitude is properly given him. Here the best evidence as to the genuineness of the signatures in controversy would of course have been the testimony of Owens. Having been deprived of that by his death, the defendants in error were remitted to the proof of their case by other means, and had they not been allowed a fair amount of room, they would assuredly have failed. The fact that Owens was on terms of intimacy with the plaintiffs in error was a circumstance directly relevant upon the question as to the probability of their having signed this note for him, as was also the fact, as to one of them, that he was so frequently seen about Owens' place of business as to warrant the inference that he had some interest in the enterprise, which would lead him to become a party to a transaction for raising money for its prosecution.

Says Justice Clifford in *United States vs. Bark Isla de Cuba*, 2 Cliff., 295: "Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry, or the failure of direct proof, objections to testimony, upon the ground that any particular circumstance is irrelevant or of an inconclusive nature and tendency, are not favored, for the reason that the force and effect of circumstantial facts usually, and almost necessarily, depend upon their connection with each other, or with the direct proofs in the case. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof. *Castle vs. Bullard*, 23 How., 187. The separate examination of circumstantial facts is indispensable, in order to ascertain whether the facts themselves are fully proved; but the final determination of the issue or matter in controversy, can not safely be placed entirely upon that examination. Whether matters of fact are submitted to courts or jurors, they should be determined upon the whole evidence given; * * *."

The evidence as to the relations between the parties is too clearly proper to allow of any discussion; and while we think that as to the object for which Owens represented he wanted the money is entirely free from exception, at all events it was admissible as part of the *res gestae*.

V, IX.

These assignments properly belong together.

The fifth is that, "The court erred in admitting as evidence the book of certificates of stock of the Grange Business Association." (Record, p. 31.)

The ninth, that, "The court erred in permitting the witness, Edward Failing, to testify that the signature of Geo. W. Jones was as susceptible of imitation as that of either of the names to the note." (*Ib.*)

The recitals in the bill of exceptions touching the fifth assignment are as follows, viz.; (Record, pp. 37-8.)

"Plaintiffs called Geo. W. Jones, as a witness, and witness was shown a book that purports to be a lot of certificates of stock in the Grange Business Association, and asked to state if the signatures of Geo. W. Jones affixed to the stubs of these certificates were his genuine signatures. Answer: 'Yes; I wrote them.'

"Plaintiffs' counsel then stated to the court: 'We will tender this, and will state as to what we think it proves. We think it is a circumstance to go to the jury, from which they may draw the conclusion of such weight as they may see fit, that Owens, having the promise of money on the signature of Mr. Jones and having in his possession signatures of Jones which were genuine, so that they might have been counterfeited, would have been apt to have counterfeited his signature if he was in that business, and would not have gone off to hunt up the signature of Holmes, and also that we may ask our

expert if the name of M. B. Holmes is easier to counterfeit than the name of Geo. W. Jones, and we tender this in evidence for that purpose.'

"It had been stipulated between counsel for plaintiffs and defendants that said book was found among the papers of W. F. Owens, after his decease, by the administrator of his estate, and the witness, Jones, had testified concerning the Grange Business Association, that it was originally a joint stock company, formed for the purpose of disposing of farmers' products, chiefly grain and wool, in which interests were held by a great many persons in Douglas county, among others, himself; that he was secretary of the organization, and as such had charge of this book; that he disposed of his interest in the concern, in the year 1878, and turned the book over to W. F. Owens. This witness also testified that after the original organization of said Grange Business Association had been in existence for a few years, a great number of those originally interested in its objects, disposed of their interests and retired; that the business was thereafter conducted, so far as he was advised, by W. F. Owens, and he could not say whether other persons continued with him in interest or not."

"Defendants, by their counsel, objected that it is immaterial and irrelevant. The court overruled the objection and defendants excepted, and the exception was allowed by the court, and this book was admitted in evidence."

In regard to the ninth assignment, the bill of exceptions contains the following statement, viz. ; (Record, p. 39.)

"Edward Failing was called as a witness by plaintiffs and, upon sufficient foundation laid, admitted by the court as an expert in handwriting. The plaintiffs' counsel, during the examination of this witness, showed witness the book of certificates heretofore admitted in evidence, and containing a number of the signatures of Geo. W. Jones, and asked witness to look at the name Geo. W. Jones upon the stubs written upon this exhibit and state whether or not, in your opinion, that would be an easier name to counterfeit than that of M. B. Holmes or otherwise. Defendants, by their counsel, objected to the evidence as immaterial and incompetent. The objection was overruled by the court, and defendants excepted, and the exception was allowed by the court, and witness answered that the signature of Geo. W. Jones is as susceptible of imitation as that of either of the names to the note."

This brings us to a fuller discussion of the scope of circumstantial evidence. There was no error here. The whole theory of the defense was that the names of the plaintiffs in error had been forged to the note in suit by Owens. It had been shown that he had the promise of this loan on the name of Jones in lieu of that of Holmes. Then it seems to us that no objection could attach to the offer to show that he was at the time in possession of *fac similes* of Jones' signature, and that it was as susceptible of imitation as that of Holmes; but that the evidence was worth something in connection with the claim of forgery of the latter's signature. Of course the jury need not necessarily have concluded that these circumstances negatived this charge, for Owens might have been influenced by other considerations; but if such a deduction was fairly legitimate, the evidence was admissible, and its effect then became a matter

for the argument of counsel. *Gannon vs. People*, 127 Ill., 507. The question is, what course would the average man have pursued in such a contingency, all other things being equal? If he would probably have taken the shortest road to attain his end, we had the right to address that consideration to the jury. The case falls within the definitions of inferences as given in Hill's Ann. Laws of Oregon, Vol. 1.

"Sec. 770. Indirect evidence is of two kinds:—

1. Inferences; and,

2. Presumptions.

"Sec. 771. An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect.

"Sec. 773. An inference must be founded,—

1. On a fact legally proved; and,

2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature."

The evidence offered was a link in the chain of circumstances by which the defendants in error sought in part to prove their case, and the propriety of the court's action in admitting it is covered generally by the definitions of circumstantial evidence given in 1 Greenleaf on Evidence, §§13, 13 *a*.

We venture also to quote at some length from an admirable statement of the scope of circumstantial evidence found in *Stevenson vs. Stewart*, 11 Penn. St., 307 :

"It is, undoubtedly, a rule governing the production and admission of evidence, that the evidence offered must correspond with the allegations and be confined to the point in issue. The effect is to exclude merely collateral facts, having no connexion with the subject litigated, and, therefore, incapable of shedding light upon the inquiry, or affording ground for reasonable presumption or inference. Thus, in covenant, the issue was whether the defendant, who was a tenant of the plaintiff, had committed waste, and evidence of bad husbandry not amounting to waste, was rejected, for this could only have the effect of misleading the jury : Harris vs. Mantle, 3 T. R. 307. But it by no means follows that all collateral facts, presenting at first view no direct connexion with the principal fact, are irrelevant, and therefore inadmissible. On the contrary, great latitude is allowed to the reception of indirect, or, as it is sometimes called, circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances, the more correct their judgment is likely to be : 1 Stark. Ev., 47-8. This indirect evidence is sometimes drawn from the experience which enables us to trace a connexion between an ascertained collateral fact, and the fact otherwise undetermined ; and it is more or less cogent, as this connexion is known to be more or less natural and frequent. Where antecedent experience shows this mutuality of relation to be constant or with a great

degree of uniformity, the inference deducible, it is said, is properly termed a presumption. But this species of proof embraces a far wider scope than this. It in fact includes all evidence of an indirect nature, whether the inferences afforded by it be drawn from prior experience, or be a deduction of reason from the circumstances of the particular case, or of reason aided by experience. In the latter aspect, it is a conclusion, the value of which obviously depends on the force and directness with which it is derived from the premises, conceded or proved. But yet the competency of a collateral fact to be used as the basis of legitimate argument, is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth. Indeed, to require a necessary relation between the fact known and the fact sought, would sweep away many sources of testimony to which men daily recur in the ordinary business of life, and that cannot be rejected by a judicial tribunal, without hazard of shutting out the light. Merely foreign matter must be avoided; but, though in appearance foreign, if it bear at all on the main subject, it must be heard. As an illustration of this rule, we may take the ordinary case of an indictment for knowingly uttering counterfeited bank notes, in which proof of the possession or of the prior or subsequent utterance of other simulated notes, *though of a different description*, is constantly admitted as material to the question of guilty knowledge, touching the subject of the indictment. Another instance occurred in this court, in a case where the question was as to the date of a receipt, given by the plaintiff to the defendant for money paid by the latter

to the former; evidence that the defendant had, on a certain day, alleged by the plaintiff to be the date of the receipt in question, received from another source a sum of money, was held to be relevant: Armstrong vs. Burrows, 6 W. 266. And yet there was, in these instances, no necessary or even intimate relation between the ascertained facts and the conclusion sought; but the former suggested reasons favoring the respective hypothesis of the prosecution and of the plaintiff, and this was deemed enough to authorize their introduction to the jury.

"In the case at bar, the question is of the alleged forgery of the defendant's signature to a promissory note, averred to have been given for money loaned. Such investigations, founded in imputed fraud, naturally take a wide range."

And further on—

"But the convincing power of the inference is for the jury, when weighing the value of the fact proved; not for the judge in determining the bare question of its relevancy. It is sufficient for the purposes of his inquiry, that it has some affinity with the principal inquiry, though this may be weak or remote."

In *Corser vs. Paul*, 41 N. H., 24, an action against one maker of a promissory note who defended on the ground that his name had been forged, another maker, not a party to the action, was permitted to testify that his name was a forgery, affirming *Knight vs. Heath*, 23 N. H., 410, where the question is discussed at greater length. In the last case illustrations of various applications of the rule allowing latitude in the introduction

of circumstantial evidence are given, as in the case of alleged fraud upon an heir, evidence was allowed of the perpetration of fraud upon another heir of the same estate; in the case of a fraudulent conveyance, evidence that the debtor had made other apparently fraudulent transfers was held admissible; where a note was charged to have been fraudulently altered, evidence of the alteration of other notes between the same parties was received; and upon a prosecution for forgery, it is held proper to show that the defendant had passed other forged papers about the same time.

The considerations upon which such evidence was received in these cases, it seems to us, would clearly warrant the introduction of the evidence now under discussion.

Of course the fact that the witness extended his answer so as to include the signatures of Dillard and Phipps, as well as that of Holmes, and so far did not respond to the interrogatory submitted to him, can not affect the defendants in error.

VI.

The sixth assignment of error is that, "The court erred in permitting the witness, J. S. Fitzhugh, or either of the witnesses, B. Brockway, V. L. Arrington, S. Caro, D. S. K. Buick or E. G. Hirsh, to testify as to whether he would act upon the signatures of the defendants attached to the note sued on if they came to him in an ordinary business transaction." (Record, p. 31.)

Each of these witnesses had satisfactorily shown his acquaintance with the handwriting of one or more of the plaintiffs in error, and each had testified to his belief of the genuineness of the signatures of the parties with whose handwriting he was acquainted (record, p. 38); and as a means of testing the strength and value of the witnesses' opinions, we think the questions objected to were properly allowed.

VII.

The seventh assignment of error is that, "The court erred in requiring or permitting the witness, M. B. Holmes, to testify as to whether the name signed to the deed to Mrs. Palmer was his signature, and also in requiring or permitting either of the witnesses, John Dillard or R. Phipps, to testify as to the genuineness of their respective signatures, to be used on the trial of the cause as comparison papers, and in admitting such deed and such papers in evidence as or for comparison papers, or at all." (Record, p. 31.)

The bill of exceptions recites in this connection (Record, pp. 38-9), that, "Plaintiffs called M. B. Holmes, one of defendants, as a witness, and showed witness a deed dated May 14, 1879, purporting to be made by the witness, conveying lands to one Mrs. Palmer, and asking the witness: 'State whether or not that is your genuine signature on that deed.'

"Defendants, by their counsel, then and there objected to the question as immaterial and irrelevant. The plaintiffs' counsel then stated that they desired to introduce this evidence and deed for a comparison paper and for no other purpose.

"The defendants, by their counsel, objected to the evidence and deed for that purpose, upon the ground that plaintiffs could not prove a signature by witness to be used as a comparison paper by the jury or an expert. The objection was overruled by the court, and defendants, by their counsel, then and there excepted, and the exception was allowed by the court. The witness answered that it was his genuine signature, and the deed was admitted in evidence, and used as a comparison paper.

"A number of other papers with the name of this defendant on them, and the names of each of the other defendants, John Dillard and R. Phipps, respectively, (they each being called as witnesses by plaintiffs), were exhibited to each of them, and the same question asked, and the same objection made, and the same ruling of the court, and the same exception allowed by the court, and the same answer given by each of said witnesses, respectively, and said papers were admitted and used as comparison papers."

There is no question of privilege attaching to the questions propounded to the witnesses, and the objections interposed must rest upon the ground that proof of handwriting could not be made by comparison.

This was done under the following provision of the Oregon statutes, viz.;

"Evidence respecting the handwriting may also be given by a comparison, made by a witness skilled in such matters, or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered." 1 Hill's Ann. Laws of Oregon, Sec. 765.

In the absence of statutory provision there is no matter upon which the rules of evidence are so variant as upon the point here involved, and nothing can demand statutory adjustment more imperatively. The rule of the common law denying such means of proof, with its exception in favor of papers admitted for some other purpose relevant to the issues on trial, was recognized by this court in *Moore vs. United States*, 91 U. S., 270, as prevailing in the Court of Claims; and to the same effect is *Williams* vs. *Conger*, 125 U. S., 397, a Texas appeal, and some other cases; but the Oregon statute, and not these decisions, will control here. The question is as to whether the enactment goes only to recognize the exception to the common law rule, or to abrogate the rule altogether. Unquestionably, the latter. It is a canon of evidence applicable to all cases, and not simply to those in which fortuitous circumstances might give to a party an advantage which their absence would deny in another. The point is not open to argument upon an interpretation of the statute, and while it has not been construed by the Oregon supreme court, the view for which we contend is conclusively established by authority in cases of similar acts.

In early days, in New York, the common law rule on this subject was held to prevail (see *Jackson vs. Phillips*, 9 Cow., 94; *People vs. Spooner*, 1 Den., 343), but under a statute quite similar to that of Oregon, it is now held that papers may be introduced for the purpose of comparison only.

Peck vs. Callaghan, 95 N. Y., 73.

The same result is recognized as having followed in Tennessee.

Franklin vs. Franklin, 90 Tenn., 44.

And so as to the act of 28 & 29 Vict., Ch. 18, in which it is provided, "that comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by the witness; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute."

Birch vs. Ridgway, 1 Fost. & Fin., 270.
Cresswell vs. Jackson, 2 Id., 24.
Cobbett vs. Kilminster, 4 Id., 490.

In Michigan, where the general rule of the common law is inflexibly adhered to, papers admitted by the party against whom they were offered to contain his genuine signature were held properly received in evidence for the purpose of comparison only in *Dietz vs. Fourth National Bank*, 69 Mich., 287; and *Shorb vs Kinzie*, 80 Ind., 500, is seemingly in accord.

VIII, X.

The eighth assignment of error is that, "The court erred in admitting in evidence either of the two letters which were admitted to be in the handwriting of W. F. Owens, one of which was dated August 5, 1886, and the other dated Sept. 18, 1886, as exemplars of Owens' handwriting." (Record, p. 31.)

The tenth is that, "The court erred in permitting the witness, Edward Failing, to testify that taking the handwriting shown in the two letters admitted as exemplars of Owens' handwriting, as the ordinary handwriting of W. F. Owens, he, witness, did not think Owens could counterfeit the signatures on the note sued on." (Record, p. 32.)

The bill of exceptions in this connection makes the following recitals, viz.; (Record, p. 39.)

"Plaintiffs' counsel exhibited two letters, one dated Aug. 5, 1886, and one dated Sept. 18, 1886, and defendants' counsel admitted that they are in the handwriting of W. F. Owens. Plaintiffs' counsel then stated: 'We now offer these in evidence as examples of Mr. Owens' handwriting, for the purpose of asking our expert if the man who habitually wrote this hand was capable of forging such signatures as appear to this note in suit.' The defendants objected to the admission of the said letters for this or any other purpose as immaterial and irrelevant. The court overruled the objection, and defendants excepted, and the exception was allowed by the court, and the said letters were admitted in evidence.

* * * * * * * *

"The witness [Edward Failing] is shown the two letters admitted as examples of Mr. Owens' handwriting, and asked to state whether or not, taking the handwriting there shown as the ordinary handwriting of W. F. Owens, you believe he could have forged the names upon the note in dispute so as to correspond so nearly with the names upon the comparison papers. Defendants objected to same as immaterial and incompetent.

The objection was overruled by the court, and defendants excepted, and the exception was allowed by the court, and witness answered: 'I see no evidence in Mr. Owens' writing of any capacity to counterfeit the signatures on the note in question. I think he could not have done so.' "

Expert testimony as going to establish the identity of handwriting is understood and admitted by every one to be of an unsatisfactory character, but it is received on the ground that the closer study of such subjects made by the persons called as expert witnesses, enables them to reach safer conclusions than are apt to be arrived at by the court or jury, having less experience. The office of the testimony of such witnesses is to advise and enlighten the tribunal in whose aid they are called. This they may do by giving their opinions upon the main question, and it seems to us they may equally well do so by suggestions of any character, not remote from the true issue, which would aid the untrained mind of another person, to whom such suggestions probably would not occur, in arriving at a result.

In a somewhat similar case (*Lansing vs. Russell*, 3 Barb. Ch., 325), there was an issue out of chancery to determine the genuineness of the signature to certain deeds made by mark. The alleged grantor was shown to have been of weak mind and 89 years of age, but nothing beyond his age appeared as to his physical condition. Expert witnesses were called, who seem to have based their testimony solely upon the fact of the grantor's age, and of the appearance of genuine marks of like character made by him, and testified that in their opinion the marks in controversy were not the genuine marks of a person of the alleged grantor's age. The court

admitted the evidence, but in charging the jury commented strongly upon its weakness. On appeal, Chancellor Walworth said :

"I think the judge erred in intimating so strongly to the jury that in his opinion no skill could enable an expert to distinguish between the mark of an old man and that of a young one. And if the decision of this cause turned upon the question whether the marks upon the deeds in controversy were made by the unaided hand of C. Lansing, in the situation in which he is proved to have been in November, 1841, I should feel bound to grant a new trial, upon the ground that these remarks of the judge had misled the jury. I think the testimony of the experts, who had been in the habit of examining signatures and marks of young persons as well as of very aged ones, to prove that the marks to these deeds could not have been the genuine marks of the unaided hand of old age and decrepitude, was properly received, upon the trial, as legal evidence to establish that fact. Those who have seen the genuine signature of the patriot, Stephen Hopkins, upon the Declaration of our Independence, and have compared it with Benjamin O. Tyler's admirable *fac simile* of the signatures to that instrument, can see at once that the hand of age and disease may be successfully imitated by one in the prime of life, and in the full possession of his muscular powers. But the venerable patriot, whose head and whose heart were still strong and sound, although his hand trembled from age and disease, could not have imitated, successfully, the natural signature of B. O. Tyler. And upon examining the marks to these deeds, with a microscope, and comparing them with the marks of Mr. Lansing to other papers made about the

same time, any one who has ever turned his attention to such subjects will be satisfied that the marks to these deeds could not have been made by his unaided hand."

Now it must be clear enough to any mind that other considerations besides that of age might lead to a like result, and the appearance of the handwriting may well constitute a photograph of the writer's capacity with the pen. The dissimilarity between a disputed signature and the genuine writing of one who is claimed to have forged it, may be so great in every essential particular as to carry conviction that they could not have been the work of the same hand. If the disputed writing is made by a clean, bold, fluent direction of the pen and there is placed by its side a feeble, wavering, palsied signature, without anything further being known, the mind of the average man would at once reach the conclusion that the writings were made by different persons. In another case the contrast might be less glaring, and yet sufficiently great to enable an experienced eye to arrive at the same result. Here it had been shown that Owens was a warehouseman, not a man who gained a livelihood with his pen, and if it had appeared to the mind of an expert that the signatures in controversy were difficult to counterfeit, requiring the hand of a trained draftsman, while the letters of Owens showed that he wrote crudely, with little or no control over his pen, we see no reason why the conclusion of the expert based on such considerations, was not properly conveyed to the jury. It was but another thread in the web of circumstantial evidence. The whole case was before the trial court, and it was of course in better position to determine whether the necessary conditions for the

admission of such evidence existed than this court can be from the skeleton statement certified up in the bill of exceptions.

XI.

The eleventh assignment of error is that, "The court erred in admitting in evidence the note sued on." (Record, p. 32.)

The bill of exceptions recites (record, pp. 39-40), that, "Plaintiffs offered the note in dispute in evidence. Defendants objected to the introduction of the note because it is not sufficiently proven and as immaterial and inadmissible because it does not tend to prove the allegations of the complaint, the contract upon which plaintiffs seek to recover being an oral contract. The objections were overruled by the court, and the defendants excepted. The exception was allowed by the court and the note admitted in evidence."

There is no force in this objection. The action was unquestionably predicated upon the note, and not upon any "oral contract." If there was error in law in the admission of any evidence by which the note was sought to be proved it is covered by other exceptions, and this one is unnecessary; but if it be claimed there was an insufficiency of proof, we answer that that question is not before this court. In *Zeller's Lessee vs. Eckert*, 4 How., 289, it was said: "So far as error is founded upon the bill of exceptions incorporated into the record, it lies only to exceptions taken at the trial to the ruling of the law by the judge, and to the admission or rejection of evidence. * * * We have no concern, on a

writ of error, with questions of fact, or whether the finding of the jury accords with the weight of the evidence. The law has provided another remedy for errors of this description, namely, a motion in the court below for a new trial, on a case made."

We respectfully submit that upon a review of the whole case no error has been shown, and that the judgment of the lower court should be affirmed.

L. B. COX,
of Counsel for Defendants in Error.

Addendum.

Since the foregoing brief was completed that for the plaintiffs in error has been received, and it is thought that it calls for some reply.

Counsel for plaintiffs in error in his brief specifies fourteen assignments of error, while the record shows that but eleven were taken in the court below. In regard to most of them counsel seems simply to have subdivided the assignments contained in the record, for convenience of argument doubtless, but his method of treating them calls for this further notice on our part.

The second assignment in the brief is not found in the record, but it is simply a result of the first. The third excepts to the admission of the testimony of Abraham as to the correspondence passing between himself and Owens and the conversation between himself and B. Goldsmith. The record shows (p. 36) that Abraham testified as to the contents of the first letter received by him from Owens, and was proceeding to narrate what he had communicated to B. Goldsmith in regard to the matter when an objection was interposed to the admission of any "conversations" of Abraham with Owens or B. Goldsmith on the ground of immateriality and incompetency. A completed statement of objection and exception was here made. Further along the witness detailed at some length the correspondence between himself and Owens, and his conversations with B. Goldsmith, which is followed by this statement: "To all of which defendants, by their counsel, then

and there excepted, and their exception was duly allowed by the court."

The following sections of the Oregon Code are applicable here, and were applied in *Southern Pacific Company* vs. *Raub*, 1 C. C. A., 416:

§ 230. "An exception is an objection at the trial to a decision upon matter of law. * * * "

§ 231. "The point of the exception shall be particularly stated. * * * "

If the second exception can be entertained at all, it will be because it hinges upon and is made intelligible by the first. It is submitted that the connection is sufficiently close to warrant this, but in any event the evidence is all admissible as part of the *res gestæ*, as has been before contended. It shows the declarations of the parties in interest during the progress of their negotiations, characterizing their acts and manifesting the attitude they held, or were to hold, towards each other. The evidence was clearly admissible under the principles laid down in Wharton on Evidence, §§ 258, 259, 261, 262, 1102. See also *Newton* vs. *Insurance Company*, 2 Dill., 154; *Milne* vs. *Leisler*, 7 H. & N., 786; *Eastman* vs. *Bennett*, 6 Wis., 232.

It will be noted that no objection is taken to the fact that the witness testified to the contents of these letters instead of producing them, *nor is there any objection taken anywhere to the sufficiency of the evidence to sustain the allegations of the complaint which set up the jurisdictional facts.* The proof of the *note* is denied (Record, pp. 32, 39), but that is a very different thing. The evidence introduced as to the relations of the parties to the paper was admissible for such purpose, and if there was any contention as to its sufficiency that

point ought to have been specifically made. This should either have been done during the trial or by a motion for a new trial. Nothing of the sort was done, and the case was allowed to go to verdict and judgment by default, so far as this point was concerned. There was no motion to set the verdict aside in the court below, and the fourteenth assignment of error set forth in the brief of the plaintiffs in error (pp. 23, 84) is not supported by the record.

Respectfully submitted.

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Of Counsel for Defendants in Error.